123-349

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~1004~~. 637 342 65

THE SCHOONER "MAGGIE J. SMITH," ROBERT G. DUN, THEODORE T. ANDERSON, ET AL., CLAIMANTS, APPELLANTS,

vs.

SAMUEL H. WALKER, ENOCH ROBINSON, WILLIAM O. SNOW, ET AL.

FILED OCTOBER 6, 1884.

No. ~~1230~~.800 479 188

SAMUEL H. WALKER, ENOCH ROBINSON, ET AL., APPELLANTS.

vs.

ROBERT G. DUN, THEODORE T. ANDERSON, ET AL.

FILED NOVEMBER 28, 1884.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

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1 THE UNITED STATES OF AMERICA, } *To wit:*
District of Maryland, }

At a circuit court of the United States for the fourth circuit in and for the district of Maryland, begun and held at the city of Baltimore on the first Monday of April, being the seventh day of the same month, in the year of our Lord one thousand eight hundred and eighty-four.

Were present the Honorable Hugh L. Bond, circuit judge; Thomas J. Morris, judge Maryland district; Archibald Stirling, Jr., Esquire, att'y; John M. McClintock, Esquire, marshal; James W. Chew, cl'k.

Among other were the following proceedings, to wit:

SAMUEL H. WALKER, ENOCH ROBINSON, & others, Appellants, *vs.* CLAIMANTS OF THE SCHOONER STEAMER "MAGGIE J. SMITH," Appellees. } Appeal from District Court. In Admiralty.

The transcript of the record and proceedings of the dis-
2 trict court of the United States for the district of Maryland in the case of Samuel H. Walker, Enoch Robinson and others, libellants and petitioners, against The Claimants of the Schooner Steamer "Maggie J. Smith," respondents, lately depending therein, was filed in the circuit court here on appeal from said district court on the 25th day of July, 1883. Which said record, among other, contains the following proceedings, to wit:

Libel. Filed 6 March, 1883.

To the honorable the judge of the district court of the United States for the district of Maryland, in admiralty:

Samuel H. Walker, of Taunton, in the district of Massachusetts, managing owner and agent of the schooner "Enoch Robinson," Enoch Robinson, William O. Snow, Zachus Sherman, Baylies Wood, William S. Walker, Charles D. Barnard, Andrew B. Stienman, R. W. Cook, W. S. Robinson, Alfred Brabrook, Clifford A. Stienman, John W. Strong, Edward W. Harlow, Wilbur F. Allen, Thomas G. Gibson, Marcus M. Rhodes, John W. Linnell, Ivory H. Bumpus, John E. DeBois, Matthew Kennedy, William F. Kennedy, Mrs. J. A. Wheeler, F. W. Lincoln, adm'rs of Marion N. Lincoln, owners of the schooner Enoch Robinson, exhibit this their libel and complaint against the schooner steamer Maggie J. Smith, her tackle, apparel, and furniture, and against all persons lawfully intervening for their interest therein in a cause of collision, civil and mar-
3 itime; and thereupon said libellants allege and articulately propound as follows, viz:

First. That on Monday, February 26th, 1883, said schooner Enoch Robinson, being then tight, staunch, and strong, and well and suf-

ficiently manned and equipped, was on a voyage from Baltimore, Maryland, to Providence, Rhode Island, having on board a cargo of coal of about eight hundred and sixty-two tons, which was to be delivered at said Providence.

Second. That about seven o'clock in the evening of said twenty-sixth day of February said vessel had reached a point in her voyage about eight miles to the northward of Hereford Light on the coast of New Jersey. The wind at this time was northwest, blowing a whole sail breeze, the night was clear and the sea was smooth, and said schooner Enoch Robinson was steering northeast. Her regulation lights were set and burning brightly; a competent seaman was at the wheel; the second mate and a competent seaman were forward on the lookout, and the master was on deck. The lookout reported a light on the lee bow, and immediately after both the red and green lights were seen on a vessel approaching, and about two and a half miles off. The master of the Enoch Robinson immediately ordered the helm of his vessel to be put a port, which order was obeyed, and the red light of the approaching vessel alone became visible. When the said Enoch Robinson got on the course east northeast her helm was steadied, and she ran on this course some three or four min-
4 utes, seeing only the red light of the other vessel and showing only her red light to her, when said other vessel kept off and showed both his lights, and then kept off still more and showed only his green light, and in a few seconds struck the said Enoch Robinson a square blow about three feet forward of the mizzen rigging on the port side, cutting into her and causing her to sink in a few minutes. As soon as said other vessel showed both her lights the last time, the master of the Enoch Robinson put his helm hard up and let his spanker sheet run. That said other vessel which so ran into and sank the said Enoch Robinson proved to be the schooner steamer Maggie J. Smith.

Third. That the damage to the owners of said schooner Enoch Robinson by the loss of said schooner and stores is about $33,000; by the loss of her pending freight $1,379.20; which sum the libellants seek to recover in this suit.

Fourth. That said collision and consequent damage was caused wholly through the negligence and improper management and want of skill of the persons in charge of said Maggie J. Smith, and in no way through the fault of those in charge of said Enoch Robinson.

Fifth. That said schooner steamer Maggie J. Smith is now in the port of Baltimore, and within the admiralty and maritime jurisdiction of this honorable court.

Sixth. That all and singular the premises are true and within said jurisdiction.

5 Wherefore said libellants pray that process, in due form of law, may issue against said schooner steamer Maggie J. Smith, her tackle, apparel, and furniture; that all persons having any interest therein may be cited to appear and answer the premises; and

that the court will pronounce for the libellants for their damages above set forth, and for such other damages as it may appear that they have sustained by reason of the premises, and order the same to be paid, with costs.

M. J. BLAKE,
Master of the Schooner Enoch Robinson.
SAMUEL H. WALKER,
Managing Owner of the Schooner "Enoch Robinson."

SEBASTIAN BROWN,
JOHN LATHROP,
Proctor for Libellants.

Subscribed and sworn before me, this sixth day of March, 1883.
GEORGE MORRIS BOND,
United States Comis'r for Maryland.

Attachment.

THE UNITED STATES OF AMERICA, } *To wit:*
District of Maryland, }

The President of the United States of America to the marshal for the Maryland district, Greeting:

6 We command you that you attach, seize, take, and safely keep the schooner steamer "Maggie J. Smith," her tackle, apparel, and furniture, if she be found in your district, to appear before the judge of the district court of the United States of America for the district of Maryland, at the United States court-room in the city of Baltimore, on the 24th of March next, to answer unto Samuel H. Walker, managing owner and agent, and Enoch Robinson and others, owners of the schooner Enoch Robinson, in a cause of collision, civil and maritime, and how you shall execute this precept, you make known to us in our district court for the district aforesaid, and have you then and there this writ.

Witness the Honorable Thomas J. Morris, judge of our said district court, this 6th day of March, in the year of our Lord one thousand eight hundred and eighty-three.

Issued 6th day of March, 1883.

[SEAL.] JAMES W. CHEW, *Clerk.*

Marshal's Return.

Atta. and mon. served.

JOHN M. McCLINTOCK,
U. S. Marshal.

March 20th, 1883.

Released, on stipulation.

7 *Petition of Black, Sheridan & Wilson. Filed 9th March,* 1883.

In the District Court of the United States for the District of Maryland. } In Admiralty.

SAMUEL H. WALKER *et al. vs.* SCHR. STEAMER "MAGGIE J. SMITH."

To the honorable judge of the district court of the United States for the district of Maryland, in admiralty:

Lloyd Lowndes, H. Crawford Black, John Sheridan, and John Wilson, Jr., copartners trading as Black, Sheridan & Wilson, intervening for their interest in this suit, exhibit this their petition in a cause of collision, civil and maritime, against the schooner steamer "Maggie J. Smith," her boats, tackle, apparel, and furniture, and thereupon they allege and articulately propound as follows:

First. That on Monday, February 26th, 1883, the schooner "Enoch Robinson," being then tight, staunch, and strong, and well and sufficiently manned and equipped, was on a voyage from Baltimore, Maryland, to Providence, Rhode Island, having on board a cargo of coal of about eight hundred and sixty-two tons, shipped and owned by the petitioners, and which was to be delivered at Providence aforesaid.

8 Second. That about seven o'clock in the evening of said twenty-sixth day of February, the "Enoch Robinson" had reached a point in her voyage about eight miles to the northward of Hereford Light, on the coast of New Jersey. The wind at this time was northwest, blowing a whole sail breeze, the night was clear and the sea was smooth, and said schooner "Enoch Robinson" was steering northeast. Her regulation lights were set and burning brightly; a competent seaman was at the wheel; the second mate and a competent seaman were forward on the lookout; and the master was on deck. The lookout reported a light on the lee bow; and immediately after both the red and green lights were seen on a vessel approaching, and about two and a half miles off. The master of the "Enoch Robinson" immediately ordered the helm of his vessel to be put hard aport, which order was obeyed, and the red light of the approaching vessel above became visible.

When the said "Enoch Robinson" got on the course east northeast her helm was steadied, and she ran on this course for some three or four minutes, seeing only the red light of the other vessel and showing only her red light to her, when said other vessel kept off and showed both her lights, and then kept off still more and showed only her green light, and in a few seconds struck the said "Enoch Robinson" a square blow about three feet forward of the mizzen rigging on the port side, cutting into her and causing her to sink in a few minutes. As soon as said other vessel showed both her lights the last time, the master of the "Enoch Robinson" put his

9 helm hard up and let his spanker sheet run. That said other vessel which ran into and sunk the said "Enoch Robinson" proved to be the schooner steamer Maggie J. Smith.

Third. That the value of said coal, which was a total loss, was two thousand nine hundred and twenty-seven dollars, to recover which this petition is filed.

Fourth. That said collision and consequent damage was caused wholly through the negligence and improper management and want of skill of the persons in charge of said Maggie J. Smith, and in no way through the fault of those in charge of said "Enoch Robinson."

Fifth. That said schooner steamer Maggie J. Smith is now in the port of Baltimore, in custody of the United States marshal, by virtue of process issued in this case.

Sixth. That all and singular the premises are true and within said jurisdiction.

Wherefore said petitioners pray that process, in due form of law, may issue against said schooner steamer Maggie J. Smith her tackle, apparel, and furniture, and that the court will pronounce for the petitioners for their damages above set forth, and for such other damages as it may appear that they have sustained by reason of the premises, and order the same to be paid, with costs.

SEBASTIAN BROWN,
Proctor for Petitioners.

H. CRAWFORD BLACK.

10 Subscribed and sworn to before me, this 9th day of March, A. D. 1883.

R. LYON ROGERS,
U. S. Commissioner for Maryland.

Petition of Seamen. Filed 9th March, 1883.

In the District Court of the United States for the District of Maryland. In Admiralty.

SAMUEL H. WALKER *et al.*

vs.

SCHOONER STEAMER MAGGIE J. SMITH.

To the honorable judge of the district court of the United States for the district of Maryland, in admiralty:

M. J. Blake, master, Edward H. Lee, mate, Melvin C. Gould, 2d mate, John W. Crowell, steward, and Thomas Martin, John Hurley, Nicholous Sandberg, and Charles Welin, seamen of the late schooner "Enoch Robinson," intervening for their interest in this suit, exhibit this their petition, in a cause of collision, civil and maritime, against the schooner steamer Maggie J. Smith, her boats, tackle, apparel, and furniture, and thereupon they allege and articulately propound as follows:

11 First. That the schooner "Enoch Robinson" was sunk on February 26th, 1883, off the coast of New Jersey by a collision with the schooner steamer Maggie J. Smith, and that said collision was caused entirely by the fault of those in charge of said schooner

steamer, and without any fault on the part of those in charge of the "Enoch Robinson," and the petitioners, to save repetition, hereby adopt all the allegations contained in the libel filed in this cause.

Second. That by said collision petitioners lost property and effects of the value of twelve hundred dollars, to recover which this petition is filed.

Wherefore said petitioners pray that process in due form of law may issue against said schooner steamer Maggie J. Smith, her tackle, apparel, and furniture, and that the court will pronounce for the petitioners for their damages above set forth, and for such other damages as it may appear that they have sustained by reason of the premises, and order the same to be paid with costs.

SEBASTIAN BROWN,
Proctor for Petitioners.

Affidavit and errors in pleading as to above petition waived.

ROBERT H. SMITH,
Proctor for Claimants.

12 *Petition for Appraisement. Filed 12th March*, 1883.

In the District Court of the United States for the District of Maryland.

SAMUEL H. WALKER *et al.*
vs.
THE SCHOONER STEAMER MAGGIE J. SMITH.

To the Honorable Thomas J. Morris, judge:

The petition of Theodore T. Anderson, Robert G. Dun, Matthias D. Smith, Erastus Wiman, Newman Cowen, William G. Wilson, Marks M. Mendel, and Martin Schrenkeiser, of New York city, in the State of New York, and John G. Eaton, Jr., and Benjamin Estabrook, of Boston, in the State of Massachusetts, respectfully shows:

That your petitioners are the sole owners of said schooner Maggie J. Smith with all her appurtenances. That early in the night of the —— day of February last past a collision occurred on the high seas off the coast of New Jersey between said schooner Maggie J. Smith and the schooner Enoch Robinson, an American vessel, of which the libellants in the above-mentioned cause are alleged to be the owners, the said schooner Maggie J. Smith being light at the time and bound from —— to Newport News, Virginia, and said schooner Enoch Robinson being loaded with coal and bound from Baltimore to Providence, Rhode Island.

13 That in consequence of said collision the said last-named schooner sank with her said cargo on board of her.

That said collision and loss were occasioned or incurred without the design, neglect, fault, or privity of your petitioners.

That on the 6th day of March, instant, the libel herein was filed by Samuel H. Walker and others, the owners of said schooner Enoch Robinson, against the said schooner Maggie J. Smith and her appurtenances, to recover the sum of thirty-four thousand three hundred and

seventy-nine dollars, for damages which said libellants allege they have sustained by reason of the sinking of their said schooner, and upon the filing of said libel process was issued out of this honorable court at the instance of said libellants, under which said schooner Maggie J. Smith, etc., has been seized by the marshal of said Maryland district, and is now in his custody.

And your petitioners further show that Lloyd Lowndes and others, trading as Black, Sheridan & Wilson, the alleged owners of the cargo of coal on said schooner Enoch Robinson, have filed a petition in this cause to recover two thousand nine hundred and twenty-seven dollars, damages which said petitioners allege they have sustained by reason of the sinking of the schooner on which the same was laden; and M. J. Blake and others, the master and crew of said schooner Enoch Robinson, have also filed in said cause a petition to recover the sum of twelve hundred dollars, for damages which they allege they have suffered by the sinking of said last-named schooner.

14 Your petitioners have no knowledge of any other persons who may set up claims against their said vessel, but they allege that the claims above mentioned, if established, will exceed the value of their said schooner and her appurtenances.

Your petitioners therefore pray that they may be declared as entitled to the benefit of sections 4283 and 4284 of the Revised Statutes of the United States, that their said schooner, her engine, boats, tackle, apparel, and furniture may be appraised by persons appointed by this court; that your petitioners may be authorized to give a stipulation, with good and sufficient securities, according to the rules and practice of this court, for such appraised value, such stipulation to be for the benefit of the libelants and petitioners, (in case they shall establish the liability of the said schooner Maggie J. Smith and of all other persons who in any manner intervene and prove claims for losses sustained by reason of the aforesaid collision, *pro rata*, and that upon such stipulation being given the said schooner Maggie J. Smith, her engines, boats, tackle, apparel, and furniture, as well as the owners thereof, may be discharged from all liability for all losses incurred by reason of said collision, and that your petitioners may have such other and further relief as their cause may require.

ROB'T H. SMITH,
Proctor for Petitioners.

THEO. T. ANDERSON.

15 Subscribed and sworn to before me by Theo. T. Anderson, this 10th day of March, A. D. 1883.

R. LYON ROGERS,
U. S. Commissioner for Maryland.

Order of Court Thereon.

Ordered by the court, this 12th day of March, A. D. 1883, upon the aforegoing petition, that J. Henry Jurgens, R. C. Hayes, and Richard L. Ross be, and they are hereby, appointed appraisers to

ascertain, appraise, and report to this court the present value of the said schooner Maggie J. Smith, her engines, boats, tackle, apparel, and furniture, to the end that a stipulation for such value may be given and said vessel released.

THOMAS J. MORRIS,
District Judge.

16 *Warrant of Appraisement and Return. Filed* 14 *March,* 1883.

THE UNITED STATES OF AMERICA, } *To wit:*
District of Maryland, }

To Henry Jurgens, R. C. Hayes, and Richard L. Ross, Greeting:

Whereas in a certain cause of libel named and produced before the district court of the United States for the district of Maryland on behalf of Samuel H. Walker *et al.* against The Schooner Steamer Maggie J. Smith, the said court, on this 12th day of March, A. D. 1883, ordered a warrant to issue for the appraisement of the said schooner, justice so requiring;

You are therefore by these presents authorized and empowered, jointly and severally, and strictly charged and commanded, that you faithfully and justly appraise the said schooner Maggie J. Smith according to her value, and that you so appraise and value the same, and duly transmit the said appraisement, subscribed by you, to the said court, together with these presents, with all convenient speed.

Witness the Honorable Thomas J. Morris, judge of our said district court, this 12th day of March, A. D. 1883.

Issued on the 12th day of March, 1883.

[L. S.] JAMES W. CHEW,
Clerk Dis't C't U. S.

17 The undersigned appraisers, appointed by virtue of the annexed and foregoing warrant of appraisement, report to the honorable the district court of the United States for the district of Maryland that they proceeded to appraise and value the schooner Maggie J. Smith mentioned in the said warrant of appraisement, and find the same to be worth the sum of thirty-two thousand dollars.

J. H. JURGENS. [SEAL.]
RICHARD H. ROSS. [SEAL.]

Signed and sworn to before me, this 14th day of March, A. D. 1883.

JAMES W. CHEW, *Clerk.*

18 *Answer to Libel. Filed 15th March,* 1883.

In the District Court of the United States for District of Maryland.

ENOCH ROBINSON & others *vs.* SCHOONER STEAMER MAGGIE J. SMITH.

To the Hon. Thomas J. Morris, judge:

The answer of Robert G. Dun, Theodore T. Anderson, Matthias B. Smith, Erastus Wiman, Newman Cowen, William G. Wilson,

Marks M. Mendel, and Martin Schrenkeiser, of New York city; John J. Eaton, Jr., and Benjamin Estabrook, of the city of Boston, owners and claimants of the schooner Maggie J. Smith, her boats, engines, tackle, apparel, and furniture, to the libel and petitions against her exhibits in this case, respectfully shows unto your honor:

First. They admit that on the 26th day of February last the schooner Enoch Robinson was on a voyage from Baltimore to Providence with a cargo of coal.

Second. They admit that about 7.20 p. m. of said day the Enoch Robinson had reached the point in her voyage alleged in said libel. They deny that the wind was northwest, but allege that the direction of the wind was northwest by west and there was a good breeze, the night was clear, and the sea was smooth; but these respondents do not know what was the course of the Enoch Robinson ex-
19 cept from observations made on board their own vessel, as hereinafter stated. They admit that Enoch Robinson had her lights set and burning. They have no knowledge as to the persons on duty on the Enoch Robinson, but they deny that said persons were diligently performing their respective duties. They do not know what light on board the Maggie J. Smith was reported by the lookout of the Enoch Robinson, but they deny that the red and green lights of the Maggie J. Smith could have been seen by any one on board the Enoch Robinson when the two vessels were about two and a half miles distant, and when the helm of the Enoch Robinson is alleged in the second article of the libel to have been put hard aport. They deny that the Enoch Robinson got on a course east northeast, and that her helm was steadied, and that she ran on that course three or four minutes, seeing only the red light of the Maggie J. Smith during that time and the red light of the Enoch Robinson only being shown to the Maggie J. Smith, and that the Maggie J. Smith then kept off and showed both her lights, and then kept off still more and showed only her green light, and in a few seconds struck the Enoch Robinson, as alleged in the libel. They admit that said vessels collided; that the Maggie J. Smith struck the Enoch Robinson a square blow on the port side near the mizzen rigging and that the latter sunk. They deny that it was after those in charge of the Enoch Robinson saw both the lights of the Maggie J. Smith that her helm was put hard up and her spanker sheet let down.

20 Third. They deny that the libellants and petitioners have suffered the amounts of damages claimed in their libel and petitions, but charge that the sums claimed are exorbitant.

Fourth. They deny that the said collision was in any manner caused by any fault, negligence, improper management, or want of skill on the part of the persons in charge of the Maggie J. Smith; but allege that it was caused entirely by the negligence, mismanagement, carelessness, and want of seamanship on the part of those in charge of the Enoch Robinson.

Fifth. These respondents allege that the circumstances preceding and attendant upon said collision were as hereinafter alleged, and

they deny all the allegations of the libel inconsistent with the allegations hereinafter made.

On the evening of the 26th day of February last said schooner Maggie J. Smith was bound on a voyage from New York to Newport News, Virginia, under sail only and light, with her red and green lights only set and brightly burning, a competent and experienced seaman stationed far forward on the lookout, in a position on the fore-castle had most advantageous for the performance of his duties, a competent man at the wheel, the first and second mates on deck, the former in charge of the deck and of the navigation of the vessel and the latter assisting him also looking out for vessels and their lights. All of said men diligently and skillfully performed their respective
21 duties during that entire evening. The night was clear, the wind northwest by west, blowing a good breeze, and the Maggie J. Smith was sailing on a southwest course, nearly close hauled, with the wind on her starboard side and Hereford Light bearing about west by south eight miles distant, when the first and second mates, who were standing on the starboard side of their vessel between the main and mizzen rigging, discovered a light bearing about two points on their starboard bow, which light, when looked at through the glasses, was discovered to be a red light on the schooner Enoch Robinson about two miles distant, but immediately upon the color of the light being discovered the same was shut in and a green light appeared, bearing about the same direction on the starboard bow of the Maggie J. Smith, and simultaneously with the appearance of said green light the same was correctly reported by the lookout forward, the Maggie J. Smith continued to hold her course southwest, and said green light continued to bear on her starboard bow and to draw more on that bow as it approached, and when said two vessels came within one-half to one-quarter of a mile of each other, the green light of the Enoch Robinson still bearing so far over the starboard bow of the Maggie J. Smith as to indicate clearly the intention to pass on the starboard side of the Maggie J. Smith, said latter vessel, in order to enable the Enoch Robinson to do so with perfect safety, slightly starboarded her helm, and as she was falling off she perceived the red and green lights of the Enoch
22 Robinson, indicating an intention on the part of the latter to cross the track of the Maggie J. Smith, and the Maggie J. Smith, for the purpose of averting as far as possible the danger of collision, threatened by the last mentioned change on the part of the Enoch Robinson, put her helm hard aport, so as to pass, if possible, astern of the Enoch Robinson, but by the time the Maggie J. Smith had gotten back to her original course, southwest, the Enoch Robinson had got directly across her track and the Maggie J. Smith struck her a square blow on her port side about five feet forward of her mizzen rigging.

These respondents further allege that the starboarding and subsequent porting of the helm of the Maggie J. Smith about neutralized each other, so that at the time of the collision she was on the same course and in about the same position as she would have been, if no change on her part had taken place; and they further allege

that the Enoch Robinson having the wind on her port side, it was her duty to keep so far out of the way of the Maggie J. Smith as not to cause danger or apprehension of a collision between them, and that, if she had done so, the Maggie J. Smith would have kept her course, as she had a right to do, without any alteration therein.

They further allege that when the two vessels had got, as hereinbefore alleged, within from half to quarter of a mile of each other, although the Enoch Robinson was showing, and had for some time been showing, her green light so far over the starboard bow of the Maggie J. Smith as to indicate an intention to pass her on
23 the starboard side, the lines of approach were so near together that it was a proper precaution upon the part of the Maggie J. Smith to starboard his helm, as she did, for the purpose of enabling the two vessels to pass farther apart, and that it was inexcusable negligence and want of seamanship on the part of those in charge of the Enoch Robinson, of her having so long given every indication that she intended to pass to the starboard, suddenly to change her course and run right across the bow of the Maggie J. Smith, when the vessels were so near together as to render it impossible to do anything on the part of the Maggie J. Smith to avert the collision then rendered inevitable.

And they pray to be hence dismissed with costs.

ROBERT H. SMITH,
JOHN H. THOMAS,
Proctors for Resp'd'ts.

THEO. T. ANDERSON.

Subscribed and sworn to by Theo. T. Anderson, this 15th day of March, A. D. 1883.

R. LYON ROGERS,
U. S. Commissioner for Maryland.

24 *Petition and Leave to Amend Libel. Filed* 19 *March,* 1883.

In the District Court. In Admiralty.

ENOCH ROBINSON *et al. vs.* SCHOONER STEAMER MAGGIE J. SMITH.

To the honorable judge of the district court:

Libellants, in pursuance of a verbal suggestion made when the case was ordered, show that by mistake of their proctor the libel alleges that the wheel of the Enoch Robinson, when the Maggie J. Smith was first reported, was sent hard aport, when it should have alleged simply that it was sent aport; and to show that it was a mistake of the proctor libellants offer to produce the protest made long before the libel was drawn. And they show further that the libel was prepared hurriedly by the proctor, in Boston, in order that it might be sent to Baltimore in time to have the Maggie J. Smith attached before she could leave the port. And libellants ask leave to amend their libel and the petitioners ask leave to amend their petitions by striking out the word hard used as above set forth.

JOHN LATHROP,
Proctor for Lib'l'ts.

Leave granted to amend the libel as prayed. March 19, 1883.

THOS. J. MORRIS,
District Judge.

25 *Stipulation. Filed 20 March*, 1883.

THE UNITED STATES OF AMERICA, } *To wit:*
District of Maryland, }

Be it remembered that on this 20th day of March, in the year of our Lord one thousand eight hundred and eighty-three, before me, Rob't Lyon Rogers, a commissioner appointed by the circuit court of the United States, for the fourth circuit, in and for the Maryland district, pursuant to the act of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," appear William G. Scarlett, corner of Baltimore and Charles st's, and Charley C. F. Eichler, No. 61 West Fayette street, both of Baltimore, Maryland, of the district aforesaid, in their proper persons, and submit themselves to the jurisdiction of the district court of the United States for the district of Maryland, and consent to bind themselves, and do acknowledge themselves, their heirs, executors, and administrators, to be bound in the sum of thirty-two thousand dollars, for the claimants of the schooner steamer Maggie J. Smith, unto Samuel H. Walker and others, to perform and fulfil the final order and decree of the said district court, and, in case of an appeal from such final order and de-

26 cree of the said district court, then the final order and decree of the circuit court of the United States for the fourth circuit, in and for the Maryland district, and in case of an appeal from such final order and decree of the said circuit court, then the final order and decree of the Supreme Court of the United States, in a certain cause now depending in the said district court wherein the said Samuel H. Walker and others are libellants and the claimants of the said schooner steamer Maggie J. Smith are respondents, and unless they so do they severally consent that execution shall issue against them, their heirs, executors, and administrators, their goods, chattels, lands, and tenements, wheresoever found or to be found.

Acknowledged before—
[SEAL.]

ROB'T LYON ROGERS,
U. S. Commissioner for Maryland.

27 *Findings of the Circuit Court. Filed 3rd May*, 1884.

In the Circuit Court of the United States, for the Fourth Circuit and District of Maryland.

SAMUEL H. WALKER *et al.*

vs.

SCHOONER STEAMER "MAGGIE J. SMITH."

This case having been heard and considered, the court finds the following facts and conclusions of law:

Finding of Facts.

1. Soon after seven o'clock in the evening of February 26th, 1883,

the three-masted schooner steamer "Maggie J. Smith," under sail only, ran into and sunk the three-masted schooner "Enoch Robinson" off the coast of New Jersey, about 8 miles to the northward of Hereford light. The night was clear and starlight. The wind was about northwest and blowing a whole sail breeze. The sea was smooth.

2. The "Enoch Robinson," of 573 tons, custom-house measurement, was on a voyage from Baltimore, Maryland, to Providence, R. I., with a cargo of 862 tons of coal on board, when the "Maggie J. Smith" was first discovered by those on board the "Enoch Robinson" the latter vessel was on her regular course, heading northeast, and had the wind on her port side. Her regulation lights were set and burning brightly. Her master and second mate were on deck, a competent seaman on the lookout forward on
28 the top-gallant forecastle, and a competent seaman at the wheel.

3. The schooner steamer "Maggie J. Smith," a large three-masted schooner, was on a voyage from New York to Newport News, Va. Her course was southwest. Her first mate and engineer, who was acting as second mate, were on deck, one man at the wheel, and another stationed forward on the lookout. Her regulation lights were set, and she had the wind on her starboard side.

4. When the vessels were first seen from each other they were about two miles apart. Those on deck of the "Maggie J. Smith," and in charge thereof, aver that they saw the "Robinson" about two points on the starboard bow of the "Smith," and those on the deck of the "Robinson" allege that they saw the "Smith" coming nearly dead ahead and on a directly opposite course. These statements, considered in connection with all the evidence, show the fact to be, and it is so found, that the vessels were approaching each other, end on or nearly so, and on courses involving risks of collision. Those in charge of the "Maggie J. Smith," in order, as they allege, to give the "Robinson" a wider berth, starboarded the wheel of the "Smith," and the wheel of the "Robinson" was put to port almost immediately after the position of the "Smith" was discovered. When those in charge of the "Robinson" perceived that the "Smith" was falling off and that the vessels were approaching in dangerous proximity, they put the wheel of the "Robinson" hard aport, and let go the spanker-sheet. A few seconds before the
29 collision the wheel of the "Smith" was first put to port, and then hard aport, but the head-sheets were not let go, and before these changes to port materially affected the course of the "Smith" the two vessels came together, the "Smith" striking the "Robinson" a square blow on the port side near the mizzen rigging, the jib-boom of the "Smith" passing through the main-sail of the "Robinson," and the "Robinson" sank in a few minutes with her cargo, and was a total loss. The officers and men of the "Robinson" lost all their personal effects.

5. The starboarding of the "Smith" was the direct cause of the collision.

Conclusions of Law.

1. That the "Smith" was in fault in not porting her wheel when the "Robinson" was first seen approaching her end on, or nearly end on.

2. That the "Smith" was in fault for putting her wheel to starboard, and this was the immediate cause of the collision.

3. The libellants are entitled to a decree for the value of their schooner, freight, and stores, with interest and costs from the time of the loss, and the several petitioners are entitled to a decree for the value of their cargo and effects, respectively, interest to be reckoned at the rate of 6 per cent. from the date of the loss. A decree will be signed to that effect.

HUGH L. BOND,
Circuit Judge.

May 3rd, 1884.

30 *Decree. Filed 3rd May*, 1884.

In the Circuit Court of the United States for the Fourth Circuit and District of Maryland.

SAMUEL H. WALKER *et al.*
vs.
THE SCHOONER STEAMER "MAGGIE J. SMITH."

Appeal from the District Court in Admiralty.

This cause having been argued by the proctors of the respective parties, and the libel, petitions, answer, and other proceedings having been read and considered, it is adjudged, ordered, and decreed by the court, this 3rd day of May, 1884, that the decree of the district court be, and the same is hereby, reversed, with costs of the district court and of this court.

It is further ordered, adjudged, and decreed that Samuel H. Walker, Enoch Robinson, William O. Snow, Zachus Sherman, Baylies Wood, William S. Walker, Charles T. Barnard, Andrew B. Sherman, R. W. Cook, W. S. Robinson, Alfred Brabrook, Clifford A. Stienman, John W. Strong, Edward W. Harlow, Wilbur F. Allen, Thomas G. Gibson, Mateus M. Rhodes, John W. Linnell, Ivory H. Bumpus, John T. DeBois, Martin Kennedy, William F. Kennedy, and Mrs. J. A. Wheeler and F. W. Lincoln, administrators of Marian Lincoln, owners of the schooner "Enoch Robinson," the libel-
31 lants, are entitled to recover for the value of said schooner, as a total loss, the sum of thirty-two thousand ($32,000) dollars; that they are entitled to recover, as for the net freight lost by the collision, the sum of twelve hundred ($1,200) dollars, and for stores likewise lost the sum of one hundred and thirty-seven ($137.10) dollars and ten cents, with interest on said three sums from the 27th day of February, 1883; that Lloyd Lowndes, H. Crawford Black, John Sheridan, and John Wilson, Jr., copartners, trading as Black, Sheridan and Wilson, are entitled to recover the sum of two thousand seven hundred and one dollars and fifty cents ($2,701.50), for the value of 862 tons of coal at the port of shipment, lost by the col-

lision, with interest from February 27th, 1883; that the following officers and seamen of the schooner "Enoch Robinson," for personal effects lost by the collision, with interest from the 27th day of February, 1883, are entitled to the recovery as follows: M. J. Black, four hundred and forty-two dollars and seventy-nine cents ($442.79); Edward H. Lee, one hundred and fifty-two dollars and fifty cents ($152.50); Melvin C. Gould, seventy-two dollars ($72); John W. Crowell, one hundred and forty-seven dollars and seventy cents ($147.70); Thomas Martin, thirty dollars and sixty cents ($30.60); John Hurley, eighty-two dollars and seventy-five cents ($82.75); Nicholas Sandberg, one hundred and eleven dollars and sixty cents ($111.60), and Charles Welin one hundred and seventeen dollars and sixty-five cents ($117.65).

32 It is further adjudged, ordered, and decreed that William G. Scarlett and C. F. Eichler, the stipulators, within ten days from the date hereof, pay in to the registry of this court the sum of thirty-two thousand dollars, and that in default thereof execution shall issue against them.

It is further ordered that after deducting from the sum decreed to be paid by the stipulators the costs of the libellants and petitioners in this court and the district court, James W. Chew, the clerk of this court, shall pay the net balance to the libellants and petitioners, or their proctors, *pro rata*, based on the amounts allowed to the libellants and petitioners by the foregoing decree.

HUGH L. BOND,
Circuit Judge.

Appeal by Claimants.

From which said decree the said claimants (appellees), by their proctors, in open court, here pray an appeal to the next term of the Supreme Court of the United States to be held on the second Monday of October next, and it is granted them.

33 *Petition & Order Limiting Liability. Filed 13th May*, 1884.

In the Circuit Court of the United States for District of Maryland.

SAMUEL H. WALKER *et al. vs.* THE SCHOONER MAGGIE J. SMITH.

To the Hon. Hugh L. Bond, judge:

The petition of Theodore T. Anderson, Robert G. Dun, Matthias B. Smith, Erastus Wiman, Newman Cowen, William G. Wilson, Marks M. Mendel, and Martin Schrenkeiser, of New York city, in the State of New York, and John G. Eaton, Jr., and Benjamin Estabrook, of Boston, in the State of Massachusetts, respectfully shows:

That your petitioners filed in the district court, in this case, a petition, which they pray may be made a part hereof, asking to have their liability for damages claimed in this suit, if any, limited to the amount or value of their interest in the schooner Maggie J. Smith, and her freight, for the voyage pending at the time of the collision mentioned in said petition.

They now further allege there was no freight pending for said voyage, and that, in accordance with their said petition, the district court directed that the said schooner Maggie J. Smith should be appraised, and that, in accordance with said direction, she was
34 appraised at the sum of thirty-two thousand dollars, and thereupon your petitioners filed in said district court a stipulation for the proper amount, to wit, for the said sum of thirty-two thousand dollars, which was approved of by said court, to perform and fulfill the final order and decree of the said district court, and in case of an appeal from such final order and decree of the said district court, then the final order and decree of this court; and in case of an appeal from such final order and decree of this court, then the final order and decree of the Supreme Court of the United States.

Wherefore your petitioners pray that this honorable court will pass an order to restrain the further prosecution of all or any suit or suits against your petitioners by any of the parties to this cause in respect of such claim, except for a *pro rata* share of the amount secured by said stipulation.

THEO. T. ANDERSON.

ROBT. H. SMITH,
JNO. H. THOMAS,
Proctors for Respondents.

Subscribed and sworn to before me, this 12th May, 1884, by Theodore T. Anderson.

JAS. W. CHEW, *Clerk.*

Ordered by the court upon the aforegoing petition, this 13th day of May, A. D. 1884, that all of the parties, libellants, and petitioners who have filed in this cause claims against the schooner Maggie J. Smith be, and they are hereby, restrained from prosecuting any suit or suits against the owners of said schooner for the re-
35 covery of *of* any sum or sums claimed on account of damages resulting from this collision between said schooner Maggie J. Smith and the schooner Enoch Robinson, mentioned in the proceedings in this case, other than this *pro rata* share of the sum of thirty-two thousand dollars, the appraised value of said schooner, secured by the stipulation in this case.

HUGH L. BOND,
Circuit Judge.

36 *Claimants' First Bill of Exceptions. Filed 13th May*, 1884.

In the Circuit Court of the United States for District of Maryland.

ENOCH ROBINSON *et al.*
vs
THE SCHOONER MAGGIE J. SMITH.

After the findings of facts and law by the court, of which the respondents had no notice until the decree was filed, the respondents and claimants prayed the court to find the following additional proposition of law:

That even if the vessels were approaching end on, or nearly so, when at the distance of two miles apart, and the Maggie J. Smith, at that distance apart and under those circumstances, was starboarded, her fault, if any, in that respect, was not such as to render her responsible for the damages claimed in this suit.

And the court refused to find said propositional law, wherefore the respondents prayed the court to sign and seal this their first bill of exception, which is accordingly done, this 13th day of May, A. D. 1884.

HUGH L. BOND, [SEAL.]
Circuit Judge.

37 *Claimants' Second Bill of Exceptions. Filed 13th May, 1884.*

After the findings of facts and law by the court, of which the respondents had no notice until the decree was filed, the respondents and claimants prayed the court to find the following additional proposition of law:

That if those in charge of the Enoch Robinson, when they perceived that the Maggie J. Smtth had starboarded and was falling off to port, and that the vessels were approaching in dangerous proximity, while they saw the Maggie J. Smith falling off as aforesaid so as to cause the Enoch Robinson to fall in the same direction, then the Enoch Robinson was also in fault, and is responsible for part of the damages resulting from the collision which afterward occurred.

And the court refused to find said proposition of law, because the findings of fact found by the court do not raise any such question of law, wherefore the respondents prayed the court to sign and seal this their second bill of exceptions, which is accordingly done, this 13th day of May, A. D. 1884.

HUGH L. BOND, [SEAL.]
Circuit Judge.

38 *Claimants' Appeal Bond. Filed 13th May, 1884.*

Know all men by these presents, that we, William G. Scarlett and Alexander D. Foreman, of Baltimore city, State of Maryland, are held and firmly bound unto Samuel H. Walker, Enoch Robinson, William O. Snow, Zacheus Sherman, Baylies Wood, William S. Walker, Charles T. Bernard, Andrew B. Sherman, R. W. Cook, W. S. Robinson, Alfred Brabrook, Clifford A. Sherman, John H. Strang, Edward W. Harlow, Wilbur F. Allen, Thomas G. Gibson, Marcus M. Rhodes, John W. Linnel, Ivory H. Bumpins, John E. DeBois, Mathew Kennedy, William F. Kennedy, and Mrs. J. A. Wheeler and P. W. Lincoln, adm'rs of Marion A. Lincoln, Lloyd Lowndes, H. Crawford Black, John Sheridan, and John Wilson, Jr., trading as Black, Sheridan & Wilson, M. J. Blake, Edward H. Lee, Melvin C. Gould, John W. Crowell, Thomas Martin, John Hurley, Nicholas Sandberg, and Charles Welin, in the full and just sum of ten thousand dollars, current money, to be paid to the said Samuel H. Walker, Enoch Robinson, William O. Snow, Zacheus Sherman, Baylies Wood, William S. Walker, Charles T. Bernard, Andrew B. Sher-

man, R. W. Cook, W. S. Robinson, Alfred Brabrook, Clifford A. Sherman, John H. Strang, Edward W. Harlow, Wilbur F. Allen, Thomas G. Gibson, Marcus M. Rhodes, John W. Linnell, Ivory H. Bumpins, John E. DeBois, Mathew Kennedy, William F. Kennedy, Mrs. J. A. Wheeler, F. W. Lincoln, adm'r of Marion A. Lincoln, Lloyd Lowndes, H. Crawford Black, John Sheridan, and John
39 Wilson, M. J. Black, Edward H. Lee, Melvin C. Gould, John H. Crowell, Thomas, Martin, John Hurley, Nicholas Sandberg, and Charles Welin their certain attorney, executors, administrators, or assigns; the payment of which, well and truly to be made and done, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this 13th day of May, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas lately, in a suit depending in the circuit court of the United States for the fourth circuit in and for the Maryland district, between Samuel H. Walker and others, owners of the schooner "Enoch Robinson," Lloyd Lowndes, and others, petitioners, appellants, and Robert G. Dun and the other claimants of the schooner "Maggie J. Smith," appellees, a decree was passed in favor of the appellants, from which said decree the claimants of the said schooner "Maggie J. Smith" have prayed and appeal to the next term of the Supreme Court of the United States, and ithas been granted:

Now, the condition of the above obligation is such, that if the said claimants of the said schooner "Maggie J. Smith" do and shall prosecute their said appeal with effect, and pay all damages, costs, and interest that shall be awarded against them by the said Supreme Court in case they fail to make good their plea,
40 then the above obligation to be void; otherwise, to be and remain in full force and virtue.

W. G. SCARLETT. [SEAL.]
A. D. FORMAN. [SEAL.]

Signed, sealed, and delivered in presence of (interlineations made before signing)—

HENRY T. MELONEY.

Appeal by Libellants & Petitioners.

And the said libellants and petitioners (appellants), by their proctors, in open court here also pray and appeal to the next term of the Supreme Court of the United States, to be held on the second Monday of October next, from the court's refusal to decree interest on the amount of the stipulation and costs against the claimants; and it is granted them.

41 *Libellants' and Petitioners' Bill of Exception. Filed 13th May,* 1884.

In the U. S. Circuit Court, District of Maryland.

SAMUEL H. WALKER *et al.*

vs.

SCHOONER STEAMER MAGGIE J. SMITH.

The libellants and petitioners, after the decree was signed against the stipulators, requested the court to sign a separate decree against the claimants of the Maggie J. Smith, directing them to pay interest on the amount of the stipulation from the date of the stipulation, and costs of this court, and all costs of the district court incurred by libellants and petitioners by reason of claimants' denial of and resistance against any liability for the collision.

And the court refused to sign such decree; wherefore libellants and petitioners excepted, and prayed the court to sign and seal this their bill of exception, which is accordingly done, this 13th day of May, 1884.

HUGH L. BOND. [SEAL.]
Circuit Judge.

42 *Libellants' & Petitioners' Appeal Bond. Filed 14th May,* 1884.

Know all men by these presents, that we, William Beers and Charles W. Beers, of Baltimore city, State of Maryland, are held and firmly bound unto Robert G. Dun, Theodore T. Anderson, Matthias H. Smith, Erastus Weinsaer, Newman Cowen, William G. Wilson, Markes M. Mendel, Martin Schrenkeiser, John G. Eaton, Jr., and Benjamin Estabrook in the full and just sum of five hundred dollars, current money, to be paid to the said Robert G. Dun, Theodore T. Anderson, Mat-hias B. Smith, Erastus Weinsaer, Newman Cowen, William G. Wilson, Markes M. Mandel, Martin Schrenkeiser, John G. Eaton, Jr., and Benjamin Esterbrook, their certain attorney, executors, administrators, or assigns; the payment of which, well and truly to be made and done, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 14th day of May, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas lately, at a circuit court of the United States for the fourth circuit in and for the district of Maryland, in suit depending therein between Samuel H. Walker and others, appellants, and the claimants of the schooner "Maggie J. Smith," appellees, a decree was passed therein in favor of the said appellants, from which said decree the said Samuel H. Walker and the other libellants and petitioners in the said cause have prayed an appeal to the
43 next term of the Supreme Ceurt of the United States, and it has been granted them:

Now the condition of the above obligation is such that if the said libellants and petitioners, Samuel H. Walker and others, shall prosecute their appeal with effect and pay all costs that may be awarded

against them by the said Supreme Court in case they fail to make good their plea, then the above obligation to be void; otherwise, to remain in full force and virtue.

WILLIAM BEERS. [SEAL.]
CHARLES W. BEERS. [SEAL.]

Signed, sealed, and delivered in the presence of—
HENRY T. MELONEY.

And thereupon it is ordered by the court here that a transcript of the record and proceedings aforesaid, with all things relating to the same, be transmitted to the Supreme Court of the United States to be held on the second Monday of October next, in accordance with rule 8, sec. 6, of the rules of the Supreme Court; and the same is transmitted accordingly.

Test: JAMES W. CHEW, *Clerk.*

UNITED STATES OF AMERICA, *District of Maryland,* } *To wit:*

I hereby certify that the foregoing is a true transcript of the record and proceedings of the circuit court of the United States for the district of Maryland in the cause aforesaid, made in pursu-
44 ance of rule 8, sec. 6, of the rules of the Supreme Court of the United States.

In testimony whereof, I hereto set my hand and affix the seal of the said circuit court, this twenty-sixth day of July, A. D. 1884.

[SEAL.] JAMES W. CHEW,
Clerk of said Circuit Court.

Endorsed on cover: Maryland C. C. U. S. No. 1004. The Schooner "Maggie J. Smith," Robert G. Dun, Theodore T. Anderson, *et al.*, claimants, appellants, *vs.* Samuel H. Walker, Enoch Robinson, William O. Snow, *et al.* Filed October 6, 1884. No. 1230. Samuel H. Walker, Enoch Robinson, *et al.*, appellants, *vs.* Robert G. Dun, Theodore T. Anderson, *et al.* Filed 28th November, 1884.

123-349

UNITED STATES SUPREME COURT.

THE SCHOONER "MAGGIE J. SMITH," ROBERT G. DUN, et al.,
Claimants, Appellants,

against

SAMUEL H. WALKER et al.,
Appellees.

BRIEF FOR CLAIMANTS AND APPELLANTS

WM. W. MACFARLAND,
Of Counsel for Appellants.

NEW YORK:
DOUGLAS TAYLOR, LAW PRINTER, 89 NASSAU STREET, COR. FULTON.
1887.

UNITED STATES SUPREME COURT.

The Schooner "MAGGIE J. SMITH,"
ROBERT G. DUN, *et al.*,
Claimants, Appellants,

against

SAMUEL H. WALKER *et al.*,
Appellees.

Brief for Claimants and Appellants.

The libel in this action was filed in the District Court of Maryland by Samuel H. Walker and others, the owners of the schooner "Enoch Robinson" against the schooner "Maggie J. Smith" to recover damages for a collision which occurred on February 26th, 1883, on the high seas off the coast of New Jersey, by which the "Robinson" was sunk.

The District Court rendered a decree finding the "Robinson" in fault.

An appeal was taken to the Circuit Court, which reversed the decree of the District Court and found the "Smith" in fault. From that decree the present appeal is brought by the owners of the "Smith." It is presented to this Court on the pleadings in the District Court and the findings of the Circuit Court alone, together with three exceptions on special questions.

No opinion was filed in either Court.

Statement of Errors.

The Supreme Court, in the case of The Adriatic (107 U. S., 512), says that on such appeals, "there is no occasion, in any case, to except specially to a finding, as its sufficiency, in connection with the pleadings, to support the decree is always open to consideration on appeal."

Aside from the questions of law presented by the bills of exceptions in this case, there is therefore presented the question of the sufficiency of the findings and of each of them to support the decree.

And in these there are, as we think, three manifest errors of law, viz.:

FIRST.—The Circuit Court has held that two vessels which did not present to each other the two colored statutory lights, were meeting, "end on or nearly end on" in the meaning of Rule 16 of Section 4233 of the Revised Statutes, which Section was in force and was the "rule of the road" at the time of this collision.

SECOND.—The Circuit Court has held that a vessel, which sees at a distance of two miles a green light of another vessel, on her own starboard bow, is at fault for not porting her helm.

THIRD.—The Circuit Court has held that a vessel seeing a green light on her starboard bow is in fault for starboarding.

First Point.

These words "end on or nearly end on" were found both in Rule 16 and Rule 18, of Section 4233, in the former applying to sail vessels and in the latter applying to vessels under steam.

The meaning of the words is the same in both rules. It means, as to navigation at night, such a position of vessels that "*each* vessel is in a position to see *both* the side lights of the other vessel."

This is the language of the Court in the case of The America (3 Ben., 429).

And, in view of the legislative construction which has been given, by the writing of these very words into the 15th Article of the Revised International Regulations for avoiding collision (23rd Stat. at Large, p. 441) we need not take time to consider or look for any other construction of those words.

Second Point.

Now the Circuit Judge, in the fourth finding, after referring to the allegations of the respective vessels, says: "These statements, considered in connection with all the evidence, show the fact to be and it is so found, that the vessels were approaching each other end on or nearly so." This was error.

a. We suppose that the old rule, that the decision must be *secundum allegata et probata*, still exists in full force.

b. The Circuit Court has not found that any allegation of either party has been overborne by proofs. On the contrary it bases its finding upon the statements.

It is true that it says that the "statements, *considered in connection with all the evidence*, show, &c." But surely this does not mean that the statements are overborne by the evidence, but the contrary. It means that there is a substantial conformity between

the evidence and the allegations. And as this Court has not the evidence before it, it must of course look at the allegations to see whether the finding of the Court is correct, that the statements in connection with the evidence show that the vessels were approaching "end on or nearly end on."

c. Turning now to the allegations, we find the following to be the situation:

1. The "Smith" was sailing on a southwest course (fol. 21), and the "Robinson" on a northeast course (fol. 3).

2. The "Robinson" saw *a* light on the lee (starboard) bow, and immediately afterwards "both the red and green lights were seen on a vessel approaching and about two and a half miles off" (fol. 3) and the "Robinson's" wheel was immediately ported, after which only the red light was visible.

   The "Smith," on her part, saw "a light bearing about two points on her starboard bow which, when looked at through the glasses, was discovered to be a red light on the "Robinson" about two miles distant; but, immediately on the color of the light being discovered, the same was shut in and a green light appeared bearing about the same direction on the starboard bow of the "Smith." * * * The "Smith" continued to hold her course southwest and said green light continued to bear on her starboard bow and to draw more on that bow as it approached and when said two vessels came within one-half to one-quarter of a mile of each other, the green light of the "Robinson" still bearing so far over the starboard bow of the "Smith" as to indicate clearly the intention to pass on the starboard side of the

"Smith," the latter vessel in order to enable the "Robinson" to do so with perfect safety slightly starboarded her helm" (fol. 21).

(*d.*) Now it is entirely manifest that, on these allegations, the two vessels were not approaching each other in such a position that *each* saw *both* the side lights of the other.

The "Robinson" says she first saw *a* light on the lee bow, that immediately after two lights were seen about two miles and a half off, and she immediately ported and then saw only the red light.

The "Smith" says she saw the red light of the "Robinson" two points on her starboard bow two miles off, which immediately shut in and showed a green light having about the same bearing.

There seems to have been a time when, for a brief space, the "Robinson" saw two lights, having previously seen *a* light, and immediately after the red light alone.

There seems also to have been a time when, during the change of the "Robinson's" lights from red to green, both of her lights must have been visible from the "Smith." But there is nothing from which the conclusion can be drawn that these two times were identical; on the contrary, it would seem that as the lights of the "Smith" were seen "on the lee bow" of the "Robinson," the "Robinson" could not *then* have been heading for the "Smith" And as the lights on the "Robinson" were seen "two points on the starboard bow" of the "Smith," the "Smith" could not then have been heading for the "Robinson."

This is not the case, which sometimes occurs, where two approaching vessels claim to have seen each other on a different bow, and where the alle-

gations are therefore contradictory. *The allegations of these two vessels, as to their positions, agree.* The "Robinson" saw the "Smith" on her lee (starboard) bow, and the "Smith" saw the "Robinson" on her starboard bow.

At neither time, therefore, could that position of the two vessels which is the legal definition of "end on or nearly end on" have existed.

e. It matters not, therefore, whether the Circuit Court gave an erroneous interpretation to the words "end on or nearly end on," or whether it overlooked the real effect of the statements upon which this finding was based. In either event there was manifest error.

Third Point.

The Circuit Court has found that "when the vessels were first seen from each other, they were about two miles apart."

It has found that the wheel of the "Smith" was put to starboard. *When* that was done it has not found.

It has found that "the starboarding of the "Smith" was the direct cause of the collision."

Moreover, while it has found as a conclusion of law: that the "Smith" was in fault for not porting, it has also found "that the "Smith" was in fault for starboarding, and that *this* was the immediate cause of the collision" (fol. 29).

This was error.

a. We are surely relieved from considering whether the finding that the "Smith" was in fault for not

porting was error or not, because on these findings, if it were a fault, such fault was immaterial and did not contribute to the collision. The cause of the collision — the "direct cause" — the "immediate cause," was the starboarding.

We consider then whether such starboarding was a fault.

b. We may infer perhaps that the Circuit Court intended to find that the "Smith's" wheel was put to starboard *when the "Robinson" was first seen two miles away.*

Now, whether that was a fault must depend upon what lights were then visible and their position.

And turning to the allegations of the pleadings, which is *all* we have to look at, we find that there was then visible to the "Smith," two points on her starboard bow, a red light which immediately shifted to a green light, which thereafter remained visible.

We cannot believe that this Court would hold a navigator in fault for turning his vessel farther away from a vessel which, by the movement of her lights, at the distance of two miles, showed that she was turning away from him.

In the case of The Adriatic, the navigator on the steamer saw a green light two points on his starboard bow. He held his course, and was held not to have been in fault for so doing (107 U. S., 512), the Court saying "The character of the approaching vessel was not known, nothing but her light being seen. But whether she was propelled by wind or steam, the steamer pursued the proper course to prevent the danger of collision."

A fortiori, would the navigator have been free from fault in starboarding, for that would carry his vessel farther away from danger.

In the case of The Elizabeth Jones (112 U. S., 514, 525) there was exactly such a situation as this, the green light of the "Jones" bearing two points on the starboard bow of the "Willis," and this Court said "by starboarding and going away from the green light of the 'Jones,' the 'Willis' took a course of safety."

This case of The Elizabeth Jones seems to be an almost identical case with the present one. And it was disposed of by this Court in accordance with the view taken of this case by the District Court instead of the view of the Circuit Court.

(*c.*) But as the Court has not specifically found that the starboarding of the "Smith" was when the "Robinson" was *first* seen (although we think that no other construction can be fairly put upon its words); let us assume that the starboarding was not when the "Robinson" was first seen, but afterwards.

The reference in the finding to the allegation of those on the "Smith" as to the *reason of their starboarding*, may perhaps indicate that the Court intended to base its finding upon that allegation. But if so, we submit that in fairness the whole of the allegation must be taken *together*. And taking it all together (fol. 21), it is that the starboarding was not when the "Robinson" was first seen, but was when the "Robinson" had, from a distance of two miles, approached to within one half to a quarter of a mile, during the whole of which approach she had been exhibiting a green light only, on the starboard bow of the "Smith."

But surely under those circumstances the Court could not hold a navigator to be in fault for starboarding. Starboarding would be a wise measure of precaution, not an act of negligence.

(*d.*) We have said, and we think, that we are not called on to consider whether the failure of the "Smith" to port "when the 'Robinson' was first seen," was a fault or not.

But we may as well say that in exactly such a position of the vessels, viz., a green light showing two points on the starboard bow, the course of the "Adriatic" in failing to port was held to be free from fault. And although the "Adriatic" was a steamer, the reason given by the Court for its so holding, covers this case just as well as hers. And the same was held to be the law in the case of the "Elizabeth Jones," where the same contention was made (112 U. S., 525).

Fourth Point.

But it may be said, that the facts alleged show that the "Smith" must have seen the two lights of the "Robinson" during the interval between her seeing the red light and her seeing the green.

But if she did, still we claim that the Smith was entitled to the finding of law embraced in the first bill of exceptions. For the circumstances referred to in the finding must be the circumstances alleged by her. And in considering this bill of exceptions it must be taken that the navigator of the "Smith," at the distance of two miles, saw the two lights of the "Robinson," the red one of which immediately disappeared, leaving the green one alone visible.

Now, in collision cases, as in all others, a man is entitled to be "judged by that which he hath, and not by that which he hath not." What the navigator of the "Smith" saw, he was entitled to act upon. And if he did act prudently upon what he did see, such action of his cannot be

charged against him as negligence. If it could be said that he did not see what ought to have been seen, then such *failure to see* might be negligence. But action, taken in accordance with what he *did* see, could not be held to be a negligent action.

So here, if the Court had found as a fact on the evidence that the two lights of the "Robinson" not only came in sight but continued in sight so long that the navigator of the "Smith" could have seen them and taken the appropriate manœuvre, but that he *did not see them*, there would be ground for holding that the "Smith" was negligent in that she had a faulty lookout.

But not only is there no finding that there was a faulty lookout; no finding that the cause of the collision was a failure to see no finding of facts even from which a faulty lookout could be inferred, because the "Smith" saw the "Robinson" two miles away, but there is a specific finding that the cause, the direct cause, the immediate cause, of the collision was not a faulty lookout, but a change of the wheel.

Now, that change of the wheel would be negligent or not according to what the navigator of the "Smith" saw.

The lights are the speech of a vessel at night. The lights of the "Robinson," showing first red only and then green only (with both the red and green lights visible in the interval), said to the navigator of the "Smith," "The 'Robinson' is turning away from you." It seems impossible that the navigator of the "Smith" can be held by this Court to have been negligent in that he *thereupon turned away from the Robinson.*

If, therefore, the time when the "Smith" starboarded her wheel be taken as being when the vessels were two miles apart, it seems to us that the appellants were entitled to such a finding of law as they requested, and that the refusal to find it was error.

Fifth Point.

Whichever of these vessels ran across the course of the other was in fault.

The light which the libel of the "Robinson" alleges that she first saw on the "Smith" must necessarily have been the green light.

There are certain findings of the Court and allegations of the "Robinson" which render this absolutely certain and beyond all question.

1st. The finding that the "Smith" was headed southwest.

2d. The finding that the "Robinson" was headed northeast.

3d. The allegation of the "Robinson's" libel that she saw *a* light on the lee bow.

With these three elements fixed by findings and allegations of the "Robinson" it is impossible to put the vessels in any other position than that shown on the diagram annexed, or for the "Robinson" to see any light except the green light of the "Smith." And in that position the vessels are not end on so as to involve risk of collision, because if both vessels had held their course they could not possibly have come together.

Add to this the allegation of the "Robinson" that "immediately after" seeing a light on the "Smith" "both the red and green lights were seen," and that the "master of the 'Robinson' immediately ordered the helm of his vessel to be put a-port, which order was obeyed, and the red light of the approaching vessel alone became visible."

The green light of the "Smith" being thus displayed to the "Robinson," and then both lights and then the red light alone, one of two things must be true.

1st. The "Smith" must have ported her helm, which would show first both lights and then the red light alone as alleged. But there is neither allegation nor finding that the "Smith" ported her helm, and if she had done so, it was not fault according to the Circuit Court.

Or,

2d. The "Robinson" must have ported her helm and run *across the course* of the "Smith," which her libel says she did.

This was faulty navigation as she left a position of safety to take the very course which resulted in the collision.

They each saw the other on the starboard bow. The "Smith" then must have been to the eastward of the "Robinson's" course, as she was headed northeast, and the "Robinson" must have been to the westward of the "Smith's" course, as she was headed southwest.

Now, the point of the collision was to the eastward of the line on which the "Smith" had been when she was headed southwest. The "Robinson" had reached that point by porting, the "Smith" by starboarding.

Which vessel had made the most easting? Clearly the "Robinson," for she says that she ported as soon as the "Smith" was seen, changed her course two points to the eastward, viz.: to east north east, and ran on that course three or four minutes, before the "Smith" made any change at all, her allegation as to the time when the "Smith" starboarded agreeing with the allegation of the "Smith," that she starboarded "when the vessels were within one-half to one-quarter of a mile of each other" fol. 22).

From that time the helm of the "Robinson" was put hard-a-port, making still more easting for her, and the helm of the "Smith" was put hard-a-port, checking her easting.

Here, then, we have a demonstration that the collision was brought about by the departure of the "Robinson" from the northeast course on which she was steering to a course of east northeast, which carried her from the west side to the east side of the line of the "Smith's" approach.

In thus crossing the line of the "Smith's" approach the "Robinson" would see just what she claims she did, viz.: first a light (which must have been the green light), next both lights, and then, if she kept on far enough, the red light alone.

Now, a mathematical calculation will show at once that if these two vessels, heading one northeast and the other southwest, at the distance of two miles, were each two points on the other's starboard bow, and kept their course, they would pass each other at a distance of over 4,000 feet apart. If one point on each other's starboard bow, 2,000 feet apart. If only half a point, they would still pass 1,000 feet apart. Put them half a point, or at most a point, and the "Robinson" must have made from 1,000 to 2,000 feet *more easting* than the "Smith" did, which she would make, with her change of course of two points, in from half a mile to a mile.

Here again we have a demonstration that, giving the true meaning to the phrase "end on or nearly end on," these vessels were not so meeting, and that but for the change of course of the "Robinson" there would have been no colfision.

Sixth Point.

In the second bill of exceptions the Circuit Court is stated to have refused to find the proposition of law requested, not because the proposition of law was erroneous, but "because the findings of fact found by the Court do not raise any such question of law" (fol. 37).

But every fact embraced in the request is in the findings of the Court.

1. The Court found that those in charge of the "Smith" starboarded.

2. The Court found that those in charge of the "Robinson" perceived that the "Smith" was falling off and that the vessels were approaching in dangerous proximity.

3. The Court found that the "Robinson's" wheel was *then* put hard-a-port.

Now, an examination of the request to find will show that all the above facts and no others are embodied in it.

And surely on those facts the question of law is presented as to what was the duty of the "Robinson" under those circumstances.

Furthermore, it would also seem to be the law that under those circumstances, viz.: that the "Robinson" saw that a vessel, which had been coming so as to pass to port, was falling off so as to pass to starboard, and coming in dangerous proximity; the "Robinson" should either have starboarded or at least kept her course. She should have assisted the other vessel in the effort (which she saw that other was making) to avoid the collision, by herself starboarding, or at least have done nothing to hinder such effort, by keeping her course, instead of attempting to thwart it by porting.

The Court might have said, "There are facts which show that such change was not a fault" (as, for instance, that the change was *in extremis*); or "There are facts which show that that fault did not affect the collision." But it has not found such facts.

It has only refused to find the conclusion of law because it considered that, on the facts which it did find, such question of law did not arise.

We submit that this was error.

Seventh Point.

It may be argued that we have no right to discuss the meaning of the finding of the Court that the vessels were meeting "end on or nearly so"; that the Circuit Court has found that the two vessels were approaching each other "end on or nearly end on," and that, whatever be the true construction of those words, such as been found to have been the actual position of the vessels.

But we submit that so to argue is to expunge the pleadings altogether, and to reverse the rule heretofore quoted from the opinion of this Court in the case of the "Adriatic" that the findings are to be considered "in connection with the pleadings."

Looking at the pleadings it is plain that no such case was alleged on the part of the "Robinson" as that the vessels were approaching each other "end on or nearly end on," in the *true* meaning of those words, or that the collision was caused by any failure on the part of the "Smith" to obey the rules which govern the navigation of vessels so approaching.

On the contrary, the allegation is that the vessels after having run three or four minutes (not each seeing both lights of the other, but) *each seeing only the red light* of the other, the "Smith" *then* starboarded. And then is the first time that the "Smith" is charged to have made any change of course.

Unless, therefore, it is to be held to be the rule that in these cases, allegations are of no importance, and that a

party has no right to rely upon the statements made by his adversary in the pleadings, the appellants in this case may justly claim that their rights have not been observed. They may well say, "We came into court relying upon the allegation of the "Robinson" that she showed only her red light and saw only our red light. We find ourselves convicted on the ground that she showed both her red and green lights and saw both our red and green lights."

In the case of the "Elizabeth Jones" (cited above), the party having first claimed that the vessels were meeting end on, undertook to vary his allegations and make the case one of vessels crossing. But the effort was marked with disapproval by this Court (112 U. S., 521).

We assume that in this case the Court will, as it always has done, bear in mind how important the allegations of the respective parties in collision cases have always been held to be. In the English Admiralty, as is well known, such allegations are by rule of Court required to be made at the outset (called the Preliminary Act) and are sealed up till the trial.

And "neither party is allowed to depart from the case he has set up in his preliminary act."

The Vortigern-Swabey, p. 18.

No such practice has yet been adopted for these cases by rule of this Court. But we venture to suggest that, even in the absence of such rule, the decisions of this Court should be such as to give weight to the allegations in collision causes; and that this decree can hardly be sustained unless the contrary practice is to be approved and parties are allowed to understand that the allegations which they make in pleadings as to the navigation of their own vessels may be disregarded by them on the trial as of no consequence.

Eighth Point.

The appellees excepted to the refusal of the Circuit Court to sign a separate decree against the claimants of the "Maggie J. Smith" directing them to pay interest on the amount of the stipulation from its date (fol. 41).

This Court in the case of the "Scotland" (118 U. S. Supreme, 507), held that "the allowance of interest by way of damage in cases of collision and other cases of pure damage as well as the allowance of costs is in the discretion of the Court."

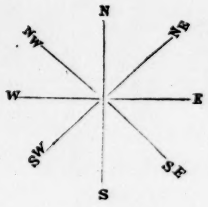
Of the exercise of discretion no error can be predicated.

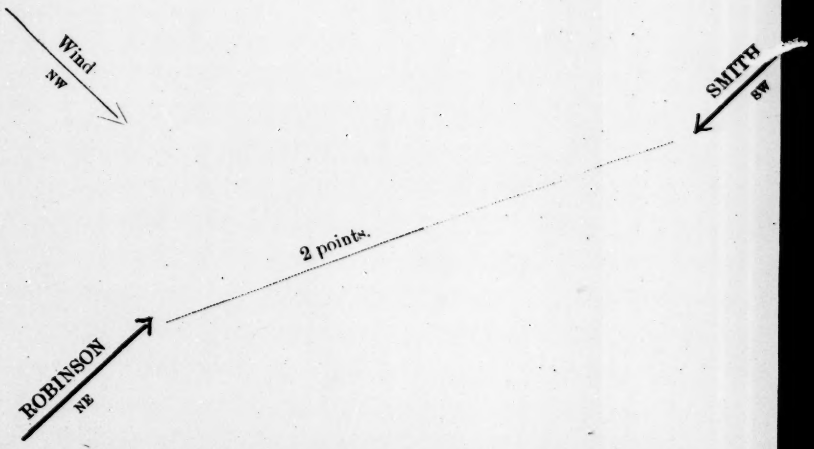
Ninth Point.

An affirmance of the decree of the Circuit Court herein will be a marked divergence from the rules of law applied to the navigation of vessels by this Court from the case of the "Adriatic" to that of the "Elizabeth Jones." The application of those rules to this case calls for a reversal of the decree of the Circuit Court and an affirmance of the decree of the District Court, with costs.

W. W. McFARLAND,
Of Counsel for Appellants.

Diagram



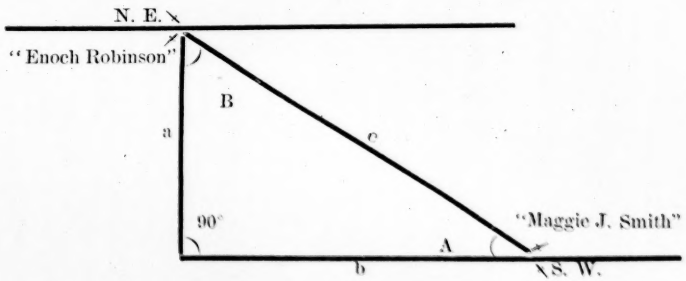


The *Smith* sees the *Robinson* two points on the starboard bow.

ADDENDUM.

The following is a mathematical calculation to show the distance at which the "Enoch Robinson" would have passed the "Maggie J. Smith" if each vessel had held its course as each was heading at the instant of first sighting.

If N. E. (the course of the "Enoch Robinson") be projected, how far will it be in a parallel line from S. W. (the course of the "Maggie J. Smith")?



The findings of the Court and the allegations of the "Robinson" give the distance C. (the distance between the vessels at first sight) as 2½ miles by one estimate, as 2 miles by another; also the angles B. and A. respectively as 68° and 22° (that is, 2 points on the starboard bow) by one estimate; as 79° and 11° (or 1 point on the starboard bow) by another. We work out the problem on both estimates.

I. Given $\left\{\begin{array}{l} c. = 2\frac{1}{2} \text{ miles} \\ B. = 68^\circ \\ A. = 22^\circ \end{array}\right\}$ to find a.

$a = c \sin A.$

$\log. a = \log. c \log. \sin A.$

$\log. c = 0.\ 39794$

$\log. \sin A = 9.\ 57358$

$\log. a = 9.\ 97152$

a .9365 miles. Ans.

II. Given $\left\{\begin{array}{l} c. = 2\frac{1}{2} \text{ miles} \\ B. = 79^\circ \\ A. = 11^\circ \end{array}\right\}$ to find a.

$a = c \sin A$

$\log. a = \log c. \log. \sin A.$

$\log. c = 0.39794$

$\log \sin A = 9.28060$

$\log. a = 9.67854$

$a = .477$ miles. Ans.

III. Given $\left\{\begin{array}{l} c. = 2 \text{ miles} \\ B. = 79^\circ \\ A. = 11^\circ \end{array}\right\}$ to find a.

$a = c \sin A.$

$\log. a = \log. c \log. \sin A.$

$\log. c = .30103$

$\log. \sin A = 9.28060$

$\log. a = 9.58163$

$a = .3816$ miles. Ans.

123-349

IN THE

SUPREME COURT OF THE UNITED STATES.

ROBERT G. DUN AND OTHERS,

CLAIMANTS OF THE SCHOONER MAGGIE J. SMITH,

Appellants,

vs.

SAMUEL H. WALKER AND OTHERS,

Appellees.

No. 1004. OCTOBER TERM, 1884.
No. 65. " " 1887.

Brief of Claimants of Schooner Maggie J. Smith.

JOHN H. THOMAS,
ROBERT H. SMITH,
Counsel for Appellants.

IN THE

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ROBERT G. DUN AND OTHERS,

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vs.

SAMUEL H. WALKER AND OTHERS,

Appellees.

No. 1004. OCTOBER TERM, 1884.
No. 65. " " 1887.

Brief of Claimants of Schooner Maggie J. Smith.

The libellants, who were owners of the schooner Enoch Robinson, and the petitioners, who were owners of property on board of her, filed libels and petitions against the Schooner Maggie J. Smith, to recover damages, resulting from a collision between those vessels, to an amount largely exceeding the value of the Maggie J. Smith and her freight, pending at the time of the collision. Thereupon the claimants of the Maggie J. Smith instituted proper proceedings, in accordance with the Admiralty Rules 54, 55, 56, 57 and 58 of this Court, to obtain the benefit of the limitation of liability, provided in the third and fourth sections of the Act of Congress of March 3, 1851, entitled: "An Act to limit the liability of ship owners,

and for other purposes." Under these proceedings their liability was limited to thirty-two thousand dollars, and a stipulation for that amount was given and approved. At the trial of the case, the District Court dismissed the libel and petitions, with costs. On appeal, the circuit judge reversed that decree, and decreed that the libellants and petitioners, respectively, were entitled to recover certain specified amounts, largely exceeding, in the aggregate, said sum of thirty-two thousand dollars; that the stipulators should bring into Court said sum of thirty-two thousand dollars, and that the clerk should divide it among the libellants and petitioners, in proportion to the amount of their respective losses as aforesaid. The claimants appealed.

Points.

The claimants contend that the findings of fact do not justify the conclusions of law found by the Circuit Court, and that the decree should be reversed. The findings of fact contain no statement as to the lights which were seen on either vessel from the other, or what was the respective speed of the vessels. These facts were indispensable to a proper understanding and correct decision of the case.

The following facts appear in the findings:

First. The wind was northwest and the night clear.

Second. The courses of the two vessels were northeast and southwest, respectively.

Third. Both vessels had the regulation lights set and burning brightly, and lookouts properly stationed.

Fourth. The vessels were two miles apart, when first seen from each other.

Fifth. "Those on the deck of the Maggie J. Smith and in charge thereof, aver that they saw the Robinson about two points on the starboard bow of the Smith, and those on the deck of the Robinson allege that they saw the Smith coming nearly dead ahead, and on a directly opposite course. (4th finding.)

Sixth. Those in charge of the Maggie J. Smith, in order, as they allege, to give the Robinson a wider birth, starboarded the wheel of the Smith, and the wheel of the Robinson was put to port almost immediately after the position of the Smith was discovered.

The Circuit Court did not find whether or not the Robinson was on the Smith's starboard bow. It found that those on the deck of the Robinson alleged that they saw the Smith "nearly dead ahead," so that the Robinson may have been, according to that finding, on either the starboard or port bow of the Smith. Since the Robinson was seen, according to the allegations of the Smith's crew, on the starboard bow of the latter, and the Smith was seen nearly dead ahead of the Robinson, but not dead ahead, the fact must have been and was that the Robinson was on the Smith's starboard bow. The libel on behalf of the Robinson in fact alleges that her lookout reported a light on her lee bow, which was her starboard bow. Taking this allegation in connection with the finding, the vessels being on directly opposite or parallel courses, the Robinson's green light must have been and was seen by those on the Smith over her starboard bow. This was the contention below on behalf of the Smith, and the Circuit Court has not found against this contention. If the findings of facts were full, they would have shown that the Robinson's green light was seen on the Smith's starboard bow, at a distance of two miles apart. This is made further apparent from the findings, viz: that the Robinson ported her helm, then hard-a-ported her helm and then let go her spanker sheet; after these movements the vessels could not have collided, unless the Robinson had previously been on the Smith's starboard bow. And so the two vessels were sailing "green to green," which is always a safe position.

Even if they were nearly dead ahead and on directly opposite courses, if the green light of each vessel was seen over the starboard bow of the other, there was no danger of a collision.

1. The Circuit Court was in error when it found, as a fact, that the vessels were approaching each other end on or nearly so, and on courses involving risk of collision.

The question of whether or not vessels, when approaching each other, are so meeting, is one of law, and not of fact. It is a conclusion of law whether vessels are meeting end on or nearly so, under a certain state of facts.

So it has been treated in this Court and in the Courts of England.

In The Nichols, 7 Wallace, 664, this Court says: "Sailing ships are meeting end on, within the meaning of that provision, when they are approaching each other from opposite directions, or on such parallel lines as involve risk of collision, on account of their proximity, and when the vessels have advanced so near to each, that the necessity for precaution, to prevent such a disaster, begins, which cannot be precisely defined, as it must always depend, to a certain extent, upon the state of the navigation, and the circumstances surrounding the occasion." "Nearly end on * * * may doubtless be construed to include cases where two sailing ships are approaching from nearly opposite directions, or on lines of approach substantially parallel, and so near to each other as to involve risk of collision."

The Dexter, 23 Wallace, 75.
The Delaware, Holt's Rule of the Road, 66.

The conclusion of law on the findings of fact was erroneous. If the contention on behalf of the Smith be true, the vessels were about to pass to the starboard of each other; and each ought to have starboarded her helm, so as to widen their lines of approach.

2. The Circuit Court was also in error, when it found as a fact, in the fifth finding, what, if true, was a conclusion of law, that the starboarding of the Smith was the direct cause of the collision. It is a part of the second conclusion of law, and as such, reviewable by this Court. The Court had, in the fourth finding, found the fact that the Smith's wheel had been starboarded, to give the Robinson a wider berth, and this was done when the vessels were two miles apart, and before any change had taken place in the Robinson's course.

If it were to be treated as a finding of fact, when it is considered in connection with the previous findings, it is inconsistent.

The correctness of this proposition is apparent, when we place the vessels in the position they were, as hereinbefore shown, viz: two miles apart, the Robinson on the Smith's starboard bow, showing her green light, and on parallel courses. In this position, the starboarding of the Smith's helm did not and could not cause the collision. The fifth finding of fact cannot, on this theory, be reconciled with the other findings, and must be left out of consideration as a fact in the case.

3. The Circuit Court was in error in the first conclusion of law, viz: That the Smith was in fault in not porting her wheel when the Robinson was first seen approaching her end on, or nearly end on.

With the green light of the Robinson bearing on the Smith's starboard bow, it would have been an error for the Smith to have ported her helm, and taken a course which would have carried her across the Robinson's course. While there was no danger of collision, when one vessel was sailing on a northeast course and the other on a southwest course, and when, at the distance of two miles apart, the one was on the other's starboard bow, as we have shown above, yet the porting of the Smith's helm would have made a collision possible, and almost certain. It is never safe to take a course, when a change is made, which leads across the bows of another vessel; and especially is this the case when, under the rule applicable, the other vessel is required to make a change, which will produce the opposite effect. Sailing vessels are liable to become becalmed, or, as in this case, the Smith, with the wind northwest, was on a southwest course, and by porting her helm, if she did so, a change of three points would have caused her sails to shake, and control would have been, in good part, lost. So that while she was on a safe course, before porting her helm, by porting it she would have run into danger.

If this conclusion of law be correct, it is to be construed as holding that two vessels, approaching each other end on or nearly end on, are, when two miles apart, each to put her helm

aport, although their courses may be two points apart, and the vessels making but two or three knots per hour. There is no such finding of facts in this case as can justify this conclusion of law.

4. The Circuit Court was also in error, in its second conclusion of law, viz: That the Smith was in fault for putting her wheel to starboard, and this was the immediate cause of the collision.

As has been already shown, the Robinson was on the Smith's starboard bow. She was not dead ahead, and she was not on the port bow.

A change of her course to port, by starboarding her helm, could not, and did not, cause the collision. The effect of such a change was to carry her away from the Robinson—to widen the distance between the courses of the two vessels.

The change which took place on the Robinson was made after the position of the Smith was discovered, and after she had starboarded her helm. The Robinson, before making that change, must have seen that the Smith was falling off, and getting farther away from her course. This movement on the part of the Robinson, if the result of porting her helm, made a collision possible, which was before impossible. There was no danger of a collision until the Robinson changed her course. It cannot, therefore, be properly found that the starboarding, by the Smith, was the immediate cause of the collision. On the contrary, it was a safe and proper move, and would have carried the vessels in safety past each other, but for the change of course on the part of the Robinson. Under the findings in this case, there are not sufficient facts, upon which to base this conclusion of law. This Court held, in the case of "The Nichols," that a change, by putting the helm to starboard, when the vessels were two or three miles apart, was a fault, but because of the fact that the vessels were approaching at a rate of twelve miles an hour. Here, no such combined speed is found. We are justified, therefore, in saying that this case does not show such a state of things as to find that the Smith was in fault, because she starboarded at a distance of two miles from the Robinson.

5. There is nothing in the findings to show what effect starboarding the "*wheel*" of the Smith, and porting the "*wheel*" of the Robinson, were calculated to produce on the "*helms*" or courses of the respective vessels. That depended upon whether the chains, by which the "*wheels*" acted on the "*helms*," were crossed or not. It is well known that they are generally *crossed*, in New England vessels. In such cases, the *helm* goes in the opposite direction, and the head of the vessel in the SAME direction as that in which the wheel is moved. The eighteenth rule, under the act of Congress, applicable to steamers "meeting end on, or nearly end on, so as to involve risk of collision," requires that the *helm* of both shall be put to port, so that each may pass on the port side of the other."

The Nichols, 7 Wall., 384.

Whether the facts find that the Robinson ported her *helm*, or leave that fact in doubt, the Circuit Court erred in its decree against the stipulators for the Smith; and that decree ought to be reversed.

6. A part of the fourth finding is "Those in charge of the Maggie J. Smith, in order, as they allege, to give the Robinson a wider berth, starboarded the wheel of the Smith, and the wheel of the Robinson was put to port almost immediately after the position of the Smith was discovered."

If this means that the helm of the Robinson was put to port before she saw either of the lights of the Smith, to inform her how the Smith was approaching, it was a fault in the Robinson. If it means, and we think it does, that her helm was put to port after the Smith had starboarded, and after the Robinson must have seen that she had done so, it was a still greater fault. After the Smith had starboarded, the vessels were no longer on courses which involved risk of collision. She was going away from the course of the Robinson. The porting of the Robinson's wheel counteracted the effort of the Smith to avoid her, and contributed to the collision.

7. Another part of the fourth finding is "When those in charge of the Robinson *perceived* that the Smith was falling off and that the vessels were approaching in dangerous proximity, they put the wheel of the Robinson hard aport and let go the spanker sheet." A part of the first finding is, "The wind was about northwest, and blowing a whole sail breeze." When, therefore, the Robinson "perceived that the Smith was falling off," they "*perceived*" that she had *starboarded*, and under the influence of a starboard wheel, was going from the westward to the eastward. It was a gross fault in the Robinson, after that, to hard aport and let go her spanker sheet. That carried her in the same direction in which she had "*perceived*" the Smith was going, in the effort to avoid her, and rendered the effort of the Smith ineffectual.

8. The fifth alleged finding of facts is more an inference from other supposed facts, and cannot be regarded as the finding of a fact from testimony. The Appellate Court is entitled to know the *facts* from which such an inference is drawn, so as to be able to judge whether the deduction is justifiable or not.

If the findings show that the libellants failed to make out their case, or left the Court *in reasonable doubt*, whether they had done so or not, their libel ought to be dismissed.

JOHN H. THOMAS,
ROBERT H. SMITH,
Counsel for Appellants.

123-349

OFFICE SUPREME COURT U. S.
FILED.
JAN 3 1885
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

October Term, 1884.

No. ~~1004~~ 165

ROBERT G. DUN AND OTHERS,
CLAIMANTS OF THE SCHOONER MAGGIE J. SMITH,
Appellants,

vs.

SAMUEL H. WALKER AND OTHERS,
Appellees.

No. ~~1230~~ 168

SAMUEL H. WALKER AND OTHERS,
Appellants,

vs.

ROBERT G. DUN AND OTHERS,
Appellees.

Brief of Claimants of Schooner Maggie J. Smith.

JOHN H. THOMAS,
ROBERT H. SMITH,
Counsel for Appellants.

Ring Bros., Print, Baltimore.

In the Supreme Court of the United States.

October Term, 1884.

No. 1004.

ROBERT G. DUN AND OTHERS,

CLAIMANTS OF THE SCHOONER MAGGIE J. SMITH,

Appellants,

vs.

SAMUEL H. WALKER AND OTHERS,

Appellees.

No. 1230.

SAMUEL H. WALKER AND OTHERS,

Appellants,

vs.

ROBERT G. DUN AND OTHERS,

Appellees.

Brief of Claimants of Schooner Maggie J. Smith.

The libellants, who were owners of the schooner Enoch Robinson, and the petitioners, who were owners of property on board of her, filed libels and petitions against the schooner Maggie J. Smith, to recover damages, resulting from a collision between those vessels, to an amount largely exceeding the value of the Maggie J. Smith and her freight, pending at the time of the collision. Thereupon

the claimants of the Maggie J. Smith instituted proper proceedings, in accordance with the Admiralty Rules, 54, 55, 56, 57 and 58, of this Court, to obtain the benefit of the limitation of liability, provided for in the third and fourth sections of the Act of Congress, of March 3d, 1851, entitled "An Act to limit the liability of ship owners and for other purposes." Under these proceedings their liability was limited to thirty-two thousand dollars, and a stipulation for that amount was given and approved. At the trial of the case, the District Court dismissed the libel and petitions with costs. On appeal, the circuit judge reversed that decree, and decreed that the libellants and petitioners, respectively, were entitled to recover certain specified amounts, largely exceeding, in the aggregate, said sum of thirty-two thousand dollars; that the stipulators should bring into Court said sum of thirty-two thousand dollars, and that the clerk should divide it among the libellants and petitioners, in proportion to the amount of their respective losses as aforesaid. The claimants appealed. The libellants and petitioners, after the decree of the Circuit Court was passed, asked for a supplemental decree against the claimants, allowing interest on the amount of the stipulation from the date of the stipulation, and the costs of the District and Circuit Courts. This was refused, and they appealed from that refusal. The libellants and petitioners now move to dismiss the appeal of the claimants, and combine with that motion one that the decree of the Circuit Court be affirmed.

Points.

The claimants contend:

1. That the only question involved in their appeal, is whether the decree against the stipulators for thirty-two

thousand dollars shall be reversed or affirmed. They have nothing to do with the distribution of the fund, as between the libellants and petitioners. Their liability would not be increased by the allowance of the claims, under five thousand dollars, nor diminished by the rejection of them.

The decisions of this Court are clear and uniform; that in a case like this, its jurisdiction on appeal depends upon the amount of the decree, not on that of any of the claims to participate in the fruits of it. In speaking of such cases, and distinguishing between them and others, in which the separate claims cannot be joined, to give jurisdiction, it says:

"There" (in cases like this) "the controversies were about matters in which the several claimants were interested collectively under a common title. They each had an undivided interest in the claim, and it was perfectly immaterial to their adversaries how the recovery was shared among them. If a dispute arose about the division, it would be between the claimants themselves, and not with those against whom the claim was made."

Ex parte Baltimore and Ohio R. R. Co., 106 U. S. 6.
Shields vs. Thomas, 17 H. 3.
Market Co. vs. Hoffman, 101 U. S. 112.
The Connemara, 103 U. S. 754.
The Mamie, 105 U. S. 773.
Farmers' Loan and Trust Co. vs. Waldemar, 106 U. S. 270.

2. The jurisdiction of this Court on appeal being clear, the motion to dismiss is a mere pretext to cover the motion to affirm. The latter, under such circumstances, is not allowable.

This Court has said, in a similar case, "our amended rule 6 allows a motion to affirm to be united with a motion to dismiss. This implies that there shall appear on the record some color of right to a dismissal."

Whitney vs. Cook, 99 U. S. 607.

There being "no color of right to a dismissal," this Court refused to entertain the motion to affirm.

3. If the merits can be considered, on this motion, the findings of fact do not justify the conclusions of law.

The fourth finding states the contentions of those on the deck of said vessel, respectively, as to their relative bearings toward each other, when they were two miles apart. "Those on deck of the Maggie J. Smith, and in charge thereof, aver that they saw the Robinson about two points on the starboard bow of the Smith, and those on the deck of the Robinson allege that they saw the Smith coming nearly dead ahead, and on a directly opposite course. These statements considered in connection with all the evidence, show the fact to be, and it is so found, that the vessels were approaching each other end on or nearly so, and on courses involving risk of collision. Those in charge of the Maggie J. Smith, in order, as they allege, to give the Robinson a wider berth, starboarded the wheel of the Smith, and the wheel of the Robinson was put to port almost immediately after the position of the Smith was discovered."

Among the findings asked for on behalf of the Smith, was, that those in charge of her "saw, a little over her starboard bow, the red light of the Enoch Robinson about a mile and a half off. In a few moments that red light was shut out, and the first and second mate and lookout saw the green light of the Enoch Robinson bearing about the same

direction. The Maggie J. Smith was kept on her course, southwest, and said first and second mates and lookout continued to look at said green light until the vessels were within about half a mile of each other. They saw that said light had drawn a little further on the starboard bow of the Maggie J. Smith, but it, nevertheless, indicated that said vessels were about to pass dangerously near to each other. The two vessels were not meeting end on, or nearly end on, or crossing, but were on parallel courses, the course of each being to the starboard of the other." The circuit judge did not find which one of these contentions, as to the bearing of the vessels towards each other, or their modes of approach, was correct, as a matter of fact, nor did he find what lights from either vessel were visible to the other, so as to enable this Court to know what the facts were, and which contention was true in reference to these important particulars. But these statements considered, in connection with all the evidence, the Court finds that they were approaching "end on or nearly end on." This looks like finding that even if they were approaching each other, as contended on behalf of the Smith, the approach was end on or nearly so, in the meaning of the law applicable to that state of facts. This, it is submitted, is a conclusion of law, not the finding of a fact, and, as a conclusion of law, is unsound. If the contention on behalf of the Smith be true, although the vessels were about to pass dangerously near to each other, they were about to pass to the starboard of each other, and each ought to have starboarded, so as to widen their lines of approach.

A part of the fourth finding of facts is, "when those in charge of the Robinson perceived that the Smith was falling off, and that the vessels were approaching in dangerous proximity, they put the wheel of the Robinson hard aport,

and let go the spanker sheet." Among the other findings were that the wind was northwest, that the course of the Robinson was northeast, and that of the Smith southwest. (1st, 2d and 3d findings.) The falling off of the Smith involved the going more to the eastward; the passing of Robinson caused her also to go more to the eastward. It was, it is submitted, a fatal fault for the Robinson to go to the eastward, *after* she saw that the Smith was going in that direction, a fault which necessarily resulted in the collision. The two vessels came together, the Smith striking the Robinson a square blow on the port side, near the mizzen rigging, the jib-boom of the Smith passing through the mainsail of the Robinson."

This could not possibly have happened, unless the Robinson had been to the starboard or westward of the Smith, and was going to the eastward, square across the bow of the Smith, as the latter, already to the eastward, was endeavoring to get further off in that direction.

The fifth finding of fact is—

"The starboarding of the Smith was the direct cause of the collision."

This, it is submitted, is not the finding of a fact, but a logical deduction, more properly belonging to the conclusions of law than the findings of fact. It is part of the second conclusion of law, and as such, is reviewable by this Court.

It seems clear, that on the Smith's theory, that she was to the eastward of the Robinson, or on the Robinson's theory, that the two vessels were dead ahead of each other, the starboarding of the Smith could not possibly have been the direct cause of the collision which occurred, the Smith striking the Robinson at right angles amidship.

The first conclusion of law is—

"That the Smith was at fault for not porting her wheel when the Robinson was first seen approaching her end on or nearly end on."

The fact, as found, is that they first saw each other when two miles apart.

The proposition of law here asserted is that the moment the Smith saw the Robinson two miles off, approaching end on or nearly end on, it was her duty to port, without stopping to ascertain with certainty whether that was her real mode of approach, or whether she only appeared to be so approaching, for a moment, as she was changing from one course or position to another. The contention, on behalf of the Smith, as before shown, is that she first saw, over her starboard bow, the red light of the Robinson, and in a few moments saw the green light in the same direction. When she saw the red light, they might have been approaching head on, or crossing, which, in these positions, would amount very nearly to the same thing. It would have been folly on the part of the Smith to port at once. The next moment the Robinson shut out her red and disclosed her green light, showing that the proper thing for the Smith to do was to starboard, not to port. No case can present more strongly than this the propriety of each vessel closely observing the movements and ascertaining with certainty the course of the other before making any change in her own course. If the contention of the Smith, as to these particular facts, be correct, and the findings do not show it to be otherwise, each vessel ought to have starboarded.

At all events, the Robinson did wrong to port, after she saw that the Smith was falling off, and the Robinson ought to be held responsible for half, if not all of the damages.

We have made no allusion to our bills of exception, because the points raised by them are involved in the find-

ings of fact and conclusions of law, and the exceptions were unnecessary.

The Tryon, 105 U. S. 267.

The appeal of the libellants and petitioners is not a cross appeal, but an independent one, from the refusal of the Court to grant a supplemental decree, the right to which was not involved in the appeal on behalf of the Smith. The record shows that the amount involved in the appeal of the libellants and petitioners is below that necessary to give this Court jurisdiction on appeal. The Court, it is submitted, will, *sua sponte*, notice the want of jurisdiction and dismiss that appeal without a motion for that purpose. The consent of counsel cannot give jurisdiction. *A fortiori* formal exception is not necessary, if the want of jurisdiction is apparent from the record.

The Lucy, 8 Wall. 309.

Costs, in admiralty, are within the discretion of the Court, and an appeal will not lie from either the refusal or allowance of them.

U. S. vs. Brig Malek Adhel, 2 H. 210.
The Sapphire, 18 Wall. 56–7.

The rules prescribed by this Court, under which the claimants sought and obtained a decree for the limitation of their liability, permit them, in the same proceedings, to contest any liability, and exempt them, whatever may be the result of that contestation, from any liability, after they have given the required stipulation, otherwise than as stipulators.

Admiralty Rules, 55, 56, 57, 58.
The Benefactor, 103 U. S. 239.
Providence & N. Y. S. S. Co. vs. Hill Man. Co., 109 U. S. 578.

For these reasons, the claimants of the Maggie J. Smith respectfully contend that the appeal of the libellants and petitioners, No. 1230, ought to be dismissed; that the motion to affirm the decree in 1004 ought to be refused, and that if the Court opens the record in the last mentioned case, to examine the merits, the decree ought to be reversed.

JOHN H. THOMAS,
ROBERT H. SMITH,
Counsel for Appellants.

23-349

OFFICE OF THE CLERK U. S.
SUPREME COURT
FILED
NOV 2 1887
JAMES H. MCKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

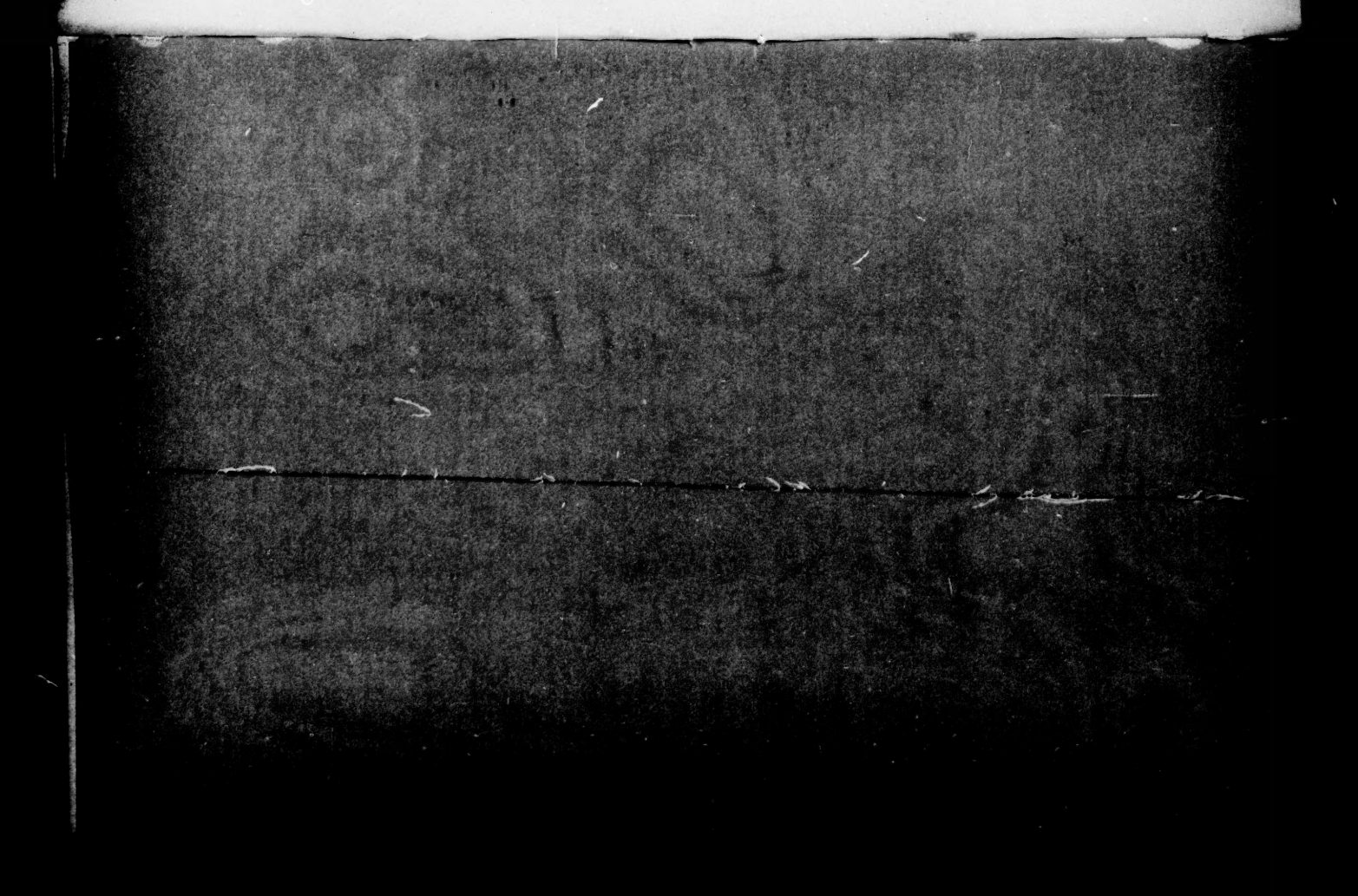
SAMUEL H. WALKER AND OTHERS

vs.

ROBERT G. DUN AND OTHERS.

No. 1230. OCTOBER TERM, 1884.

JOHN H. THOMAS,
ROBERT H. SMITH,
Attorneys for Claimants and Owners
of the Schooner Maggie J. Smith.



IN THE

SUPREME COURT OF THE UNITED STATES.

SAMUEL H. WALKER AND OTHERS

vs.

ROBERT G. DUN AND OTHERS.

No. 1230. OCTOBER TERM, 1884.

Robert G. Dun and others, claimants and owners of the Schooner Maggie J. Smith, move to dismiss the appeal in this case, because—

First. The matter in dispute, exclusive of costs, does not exceed the sum or value of five thousand dollars.

Second. The matter in dispute does not exceed the sum or value of five thousand dollars.

Third. The alleged error of the Circuit Court was only as to interest and costs, both of which were in the discretion of that Court, and neither of which is a ground of appeal.

JOHN H. THOMAS,
ROBERT H. SMITH,
Attorneys for Claimants and Owners of the Schooner Maggie J. Smith.

IN THE

SUPREME COURT OF THE UNITED STATES.

SAMUEL H. WALKER AND OTHERS

vs.

ROBERT G. DUN AND OTHERS.

Brief on behalf of the Appellees, on their Motion to Dismiss.

The appeal in this case ought to be dismissed.

First. Because the matter in dispute, exclusive of costs, does not exceed the sum or value of five thousand dollars.

Revised Statutes of the U. S., section 691.
Act of Congress of February 16, 1875.
18 Stat. at large, 315.

Second. The matter in dispute does not exceed the sum or value of five thousand dollars.

Third. The matter in dispute involved only interest and costs.

Both were within the discretion of the Circuit Court. Its action, in reference to either, or both of them, cannot be reviewed on appeal.

U. S. vs. Brig Malek Adhel, 2 H. 210.
The Sapphire, 18 Wall. 56-7.
The Scotland, 118 U. S. 509.

Fourth. The rules prescribed by this Court, under which the appellees claimed and obtained a limitation of their liability, permit them, in the same proceeding, to contest any liability, and exempt them, whatever may be the result of the contestation, from any liability, after they have given the required stipulation, unless they be parties to the stipulation.

Admiralty Rules 55, 56, 57, 58.
The Benefactor, 103 U. S. 239.

Fifth. The fifteenth Admiralty Rule, prescribed by this Court, prohibits a libel, for collision, from being filed against a vessel and her owners. To give a remedy against both, in the same proceeding, would be a violation of the spirit of that rule.

Sixth. The stipulators took the place of the vessel and the owner. A remedy against *them* and the owners cannot be afforded in the same proceeding, any more than against the owners and the vessel.

Seventh. The owners were not stipulators, and no decree could properly be entered against *them.*

The Palmyra, 12 Wheat. 1.
The Steamer Webb, 14 Wall. 406.
U. S. vs. Ames, 99.

JOHN H. THOMAS,

ROBERT H. SMITH,

Attorneys for Claimants and Owners of the Schooner Maggie J. Smith.

SAM'L H. WALKER ET AL

vs.

SCHOONER "MAGGIE J. SMITH."

IN THE

U. S. CIRCUIT COURT

DISTRICT OF MARYLAND.

I, James W. Chew, Clerk of the Circuit Court of the United States for the District of Maryland, do certify that in the District Court the costs of the libellants were..... $217 15

And the costs of the respondents were..... 98 40

That in the Circuit Court, the costs of the libellants, (including Marshal's commissions on amount of decree)..... 193 09

And the costs of the respondents were..... 38 90

[SEAL.] In testimony whereof I hereto set my hand and affix the seal of the said Circuit Court, on this 8th day of October, A. D. 1887.

JAMES W. CHEW,

Clerk of said Circuit Court.

Fourth. The rules prescribed by this Court, under which the appellees claimed and obtained a limitation of their liability, permit them, in the same proceeding, to contest any liability, and exempt them, whatever may be the result of the contestation, from any liability, after they have given the required stipulation, unless they be parties to the stipulation.

Admiralty Rules 55, 56, 57, 58.
The Benefactor, 103 U. S. 239.

Fifth. The fifteenth Admiralty Rule, prescribed by this Court, prohibits a libel, for collision, from being filed against a vessel and her owners. To give a remedy against both, in the same proceeding, would be a violation of the spirit of that rule.

Sixth. The stipulators took the place of the vessel and the owner. A remedy against *them* and the owners cannot be afforded in the same proceeding, any more than against the owners and the vessel.

Seventh. The owners were not stipulators, and no decree could properly be entered against *them*.

The Palmyra, 12 Wheat. 1.
The Steamer Webb, 14 Wall. 406.
U. S. vs. Ames, 99.

JOHN H. THOMAS,
ROBERT H. SMITH,
Attorneys for Claimants and Owners of the Schooner Maggie J. Smith.

SAM'L H. WALKER ET AL		IN THE
vs.		U. S. CIRCUIT COURT
SCHOONER "MAGGIE J. SMITH."		DISTRICT OF MARYLAND

I, James W. Chew, Clerk of the Circuit Court of the United States for the District of Maryland, do certify that in the District Court the costs of the libellants were..... $217 15
And the costs of the respondents were..... 98 40
That in the Circuit Court, the costs of the libellants, (including Marshal's commissions on amount of decree)..... 193 09
And the costs of the respondents were..... 38 90

In testimony whereof I hereto set my hand and affix the seal of the said Circuit Court, on this 8th day of October, A. D. 1887.

[SEAL.]

JAMES W. CHEW,
Clerk of said Circuit Court.

12

125-349

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 1004.

ROBERT G. DUN ET AL.,

CLAIMANTS OF THE SCHOONER "MAGGIE J. SMITH,"

Appellants,

v.

SAMUEL H. WALKER ET ALS.,

Appellees.

No. 1230.

SAMUEL H. WALKER ET AL.,

Appellants,

v.

ROBERT G. DUN ET ALS.,

Appellees.

Motions to dismiss the Appeal in No. 1004, and to affirm the Decree, with Brief in support thereof.

JOHN LATHROP and
SEBASTIAN BROWN,
For Appellees.

BOSTON:
ALFRED MUDGE & SON, PRINTERS,
24 FRANKLIN STREET.
1884.

In the Supreme Court of the United States.

October Term, 1884.

ROBERT G. DUN ET AL., *Claimants of the Schooner "MAGGIE J. SMITH," Appellants,*

v.

SAMUEL H. WALKER ET ALS., *Appellees.*

To the Honorable the Justices of the Supreme Court of the United States:

Samuel H. Walker *et al.*, the appellees in the above case, respectfully show that such of the appellees as were owners of the schooner "Enoch Robinson," filed their libel, in a cause of collision, in the District Court of the United States for the District of Maryland, against the schooner-steamer "Maggie J. Smith," and, in the same case, the appellees who owned the cargo of coal on the "Enoch Robinson," when she was sunk by the collision, and the officers and seamen of the "Enoch Robinson," filed their separate petitions against the "Maggie J. Smith," the object of said libel and petitions being to recover the several losses of the libellants and petitioners sustained by the collision; that the libel and petitions were dismissed by the District Court, and, on appeal to the Circuit Court, the decree of the District Court was reversed, and a decree entered in favor of the libellants and petitioners. Pending the proceedings in the District Court, the "Maggie J. Smith" was, by order of the Court, appraised, and a stipulation in the usual form was entered into for the sum of thirty-two thousand dollars, the amount

of the appraisement, the stipulators binding themselves to abide by and perform such orders and decrees as might be passed against them.

Proceedings were taken by the claimants in the District Court to avail themselves of the limited liability act, but, being defective, they were perfected by an order of the Circuit Court. The aggregate value of all the losses of the libellants and petitioners far exceeded the amount of the stipulation, and the Court ordered and decreed that the stipulators, within a specified time, should pay into Court the amount of the stipulation, and that the clerk, after deducting costs, should pay the net balance *pro rata* to the libellants and petitioners, based upon their respective losses as found by the Court. The separate and distinct losses of the respective petitioners were less than five thousand dollars, and the only parties whose loss exceeded that sum were the libellants, owners of the "Enoch Robinson." The Court found the facts and conclusions of law, as prescribed by the Act of Congress, on which its decree was based. The claimants of the "Maggie J. Smith" appealed to this Court.

Wherefore the appellees who were petitioners move to dismiss the appeal in so far as their rights are involved, for the reason that their claims are distinct and separate from one another and from the claim of the libellants, and are severally less than five thousand dollars.

All of the appellees, original libellants and petitioners, also move the Court to affirm said decree of the Circuit Court because it is manifest that said appeal was taken for delay only, and because the questions involved as disclosed by the record are "so frivolous as not to need further argument."

JOHN LATHROP,
SEBASTIAN BROWN.
Counsel for Appellees.

APPELLEES' BRIEF IN SUPPORT OF THE ABOVE MOTIONS.

I. The Motion to Dismiss.

The principle on which this motion is made has been fully settled by this Court. In Rich *v.* Lambert, 12 How. 347, several distinct owners of a cargo filed libels against a vessel to recover damage done to the goods while on the vessel. They all recovered, the agregate amount decreed to them being over ten thousand dollars. The claims of only two exceeded two thousand dollars, the amount at that time sufficient to give this Court jurisdiction. The claimants of the vessel appealed, those of the libellants whose separate claims were less than two thousand dollars moved to dismiss, and the motion was granted. One decree in the Circuit Court covered all the claims. "The appeal must be dismissed as to all the cases except the two in each of which the amount in the decree exceeds the two thousand dollars."

"In cases where the several claims against the ship are founded upon a common injury and loss . . . it is fit and proper that the proceedings should be joint."

"We do not perceive, therefore, any ground for a distinction as to the right of appeal from a decree as entered in these cases from that which exists where the proceedings have been distinct and separate throughout."

12 How. 352, 353.

This Court has within the last few years fully considered the question; and it is only necessary to refer to the authorities.

Ex parte Baltimore & Ohio Railroad, 106 U. S. 5.

Farmers' Loan & Trust Co. *v.* Waterman, 106 U. S. 265.
Adams *v.* Crittenden, 106 U. S. 576.
Schwed *v.* Smith, 106 U. S. 188.
Hawley *v.* Fairbanks, 108 U. S. 543, 548.
Tupper *v.* Wise, 110 U. S. 398.

When the "Maggie J. Smith" was appraised the claimants had the option of depositing the amount in Court, or giving a stipulation. Had the money been deposited in Court, or had the vessel been sold, the decree would simply have ordered the clerk to pay the parties entitled *pro rata* out of the fund. The circumstance that the claimants procured two men to enter into a stipulation cannot alter the rights of the petitioners. The decree is in the usual form where the stipulation is for less than the claims. The payment of the whole or any part of the stipulation into Court could not have interfered with an appeal if claimants were disposed to take one. The appeal would have prevented the clerk from paying out the money.

II. The Motion to Affirm.

The Court, in pursuance of Rule 6, Part 5, 108 U. S. 575, can at this time entertain the motion to affirm.

In like cases, and under similar circumstances, the Court has affirmed decrees of the Circuit Courts.

The S. C. Tryon, 105 U. S. 267, 270.

Other authorities bearing upon the question are: —

Stewart *v.* Salamon, 97 U. S. 361.
Whitney *v.* Cook, 99 U. S. 607.
Hinckley *v.* Morton, 103 U. S. 764.

The record discloses the following facts: —

The "Maggie J. Smith" is what is called a schooner-steamer. Her steam was auxiliary. She was steering on the night of the collision as a sailing vessel only. The "Enoch Robinson" was a schooner. A collision occurred between the two vessels in the evening of Feb. 26, 1883, off the coast of New Jersey. The Court "found that the vessels were approaching each other end on or nearly so, and on courses involving risk of collision." The "Robinson" had the wind on her port side, and the "Maggie J. Smith" had the

wind on her starboard. Neither vessel was close hauled. The vessels had their regulation lights set and burning. The "Maggie J. Smith" starboarded, and the wheel of the "Enoch Robinson" was put to port and afterwards hard aport. The Court also found as a fact that "the starboarding of the 'Smith' was the direct cause of the collision," and found, as conclusions of law, that the "Smith" was in fault for not porting, and that "she was in fault for putting her wheel to starboard, and this was the immediate cause of the collision." It is unnecessary to consider whether the "Maggie J. Smith" was under obligation to port, as the collision was caused by her starboarding. Under the rules of navigation and the authorities of this Court, she is clearly liable for the consequences of the collision.

U. S. Rev. Sts. (1st ed.) p. 823, Rule 16 (art. 11).
The Nichols, 7 Wall. 656.
The Dexter, 23 Wall. 69.
The Annie Lindsley, 104 U. S. 185.

The principles involved in the findings of the Court, and recognized in the above and numerous other authorities, seem so clear, that an appeal to test their correctness must be regarded as taken for delay, and the appellees submit that the decree should be affirmed.

The nature of the appellants' objections to the findings is seen in their two exceptions taken after the decree was signed. As exceptions, even if regularly before this Court, they are not material, because if the questions are pertinent and grow out of the findings they can be raised as well without as with exceptions. The statements in the exceptions to the effect that the claimants had no previous opportunity to present the questions are at variance with the fact, shown by the record, that on Jan. 28, 1884, while the trial was in progress, they filed, with their own theory of the facts, vari-

ous propositions of law, and they then, and at any time before the case was decided, could have presented propositions of law applicable to any theory of facts. After the decree was signed, the Circuit Court had no jurisdiction to entertain propositions of law without first opening the decree.

See United States *v.* Carey, 110 U. S. 51.

It is not unfortunate for the appellees, however, that these exceptions were taken, because, though as exceptions they should be excluded, the Court can see from the record the technical and untenable character of the appellants' reasons of appeal.

1. The first exception presents a question of fact and not one of law. The rule of law applies when vessels are in such proximity as to involve risk of collision. The question when they are in such proximity is a question of fact and not of law. It depends on the force of the wind and what sails the vessels are under; in other words, upon their combined rate of speed. In The Nichols, 7 Wall. 656, the combined rate of speed was twelve miles an hour. One vessel ported and the other starboarded when they were two or three miles apart. The one which starboarded was held in fault.

See also

The Dexter, 23 Wall. 69, 75.

2. The exception assumes, without any foundation, that the vessels were two miles apart when the "Smith" starboarded.

The fourth finding of fact states in substance that the vessels were first seen from each other when *about* two miles apart; that the "Smith" starboarded, but when is not stated; that the "Robinson" ported *almost immediately after* the position

of the "Smith" was discovered. Even if we assume that the two vessels changed their courses at the same time, yet this would not furnish a foundation for a request which left out the important qualifying words "about" and "almost immediately."

As a matter of fact, the Court did not find that the vessels were two miles apart when the "Smith" starboarded. The point of time when she starboarded is not mentioned in the findings, and can only be gathered from the pleadings and other papers in the record.

The findings are construed in connection with the pleadings (The Adriatic, 107 U. S. 512), and parties will not be permitted to contradict by proof what they have admitted in their pleadings. McKinlay *v.* Morrish, 21 How. 343.

The libel alleged that the vessels were running red to red, three or four minutes before the "Smith" starboarded, and the claimants, by their answer and by their statement of facts found in the record, admit that the vessels had been in sight for some time before the "Smith" starboarded, and that, when she did so, the vessels were less than half a mile apart. The point of time of starboarding and about the distance apart of the vessels — less than half a mile — were not in controversy either in the pleadings or in the proofs. The only question was whether they were meeting end on or were passing on parallel courses at a safe distance apart. The language of the findings might have been more perspicuous, but, apart from the pleadings and admissions, the words taken in connection with all the facts as found do not bear the construction asked for by the appellants. The words of the findings commencing, "Those in charge of the 'Maggie J. Smith,' in order, as they allege, to give the 'Robinson' a wider berth, starboarded," cover a statement in the answer as follows: "The 'Maggie J. Smith' continued to hold her course southwest . . . and when said vessels came within

one half to one quarter of a mile of each other . . . said latter vessel (the 'Maggie J. Smith') . . . slightly starboarded." The decree will be supported by every fair, legal intendment, and, if the findings will bear two constructions, that will be adopted most favorable to the validity of the decree. The fact that the Court, in the order of words, chanced first to speak of the "Smith" starboarding before speaking of the "Robinson" porting has no significance. We speak to a friend of A and B, saying A went down town and B went up town just after breakfast. A might not have gone for hours after B.

The request which is the subject of the second exception is unintelligible.

If the request was intended to apply to the findings, and can be so construed, it amounts to this: That where two vessels, A and B, are meeting end on or nearly end on, and A ports and B starboards, and A, when it is perceived that B has starboarded and is falling off, and the vessels are approaching in dangerous proximity, puts her helm hard-a-port, so as to fall off still more, then A is also in fault, and responsible for part of the damages.

If this presents a question of law and not one of fact, there are several reasons why it should not have been given.

1. Whether it would have been more prudent for the "Robinson" to have luffed instead of keeping off, in the dangerous position in which she was placed by the disregard of the positive statutory provision on the part of the "Smith," depends upon facts and circumstances not disclosed in the exception or in the findings of fact, namely, the angle at which the vessels were approaching, the distance they were apart, and their combined speed.

2. It is always a question of nice calculation, under such circumstances, whether a collision can best be avoided by luffing or by keeping away, and it is a question which courts will not go into. The rule is well settled that if one vessel is brought into immediate jeopardy by the fault of another, the fact that an order other than that which was given might have been more fortunate will not prevent recovery of full damages. In the words of Chief Justice Taney, in The Genesee Chief, 12 How. 461, "if an error was committed under such circumstances, it was not at fault."

See also

The Nichols, 7 Wall. 656.
The Carroll, 8 Wall. 302.
The Fairbanks, 9 Wall. 420.
The City of Paris, 9 Wall. 634.
The S. C. Tryon, 105 U. S. 267.

III.

The libellants and petitioners requested the Court to sign a supplemental decree against the claimants of the "Maggie J. Smith" for the costs, and for interest on the amount of the stipulation from the date of the stipulation to the date of the decree in the Circuit Court, but the Court refused, and the owners of the "Robinson," that is, the libellants, appealed. The Court clearly erred.

The Wanata, 95 U. S. 600.

It is submitted that the Court has jurisdiction of this cross appeal, and may dispose of it now.

Walsh *v.* Mayer, 111 U. S. 31.

But if this Court finds any difficulty in affirming the decree in the principal case in consequence of this cross appeal, then the libellants consent that their appeal be dismissed.

JOHN LATHROP,
SEBASTIAN BROWN,
Counsel for Appellees.

DECEMBER, 1884.

123-349

123-349

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

THE MAGGIE J. SMITH.

No. ~~342~~ 65.

ROBERT G. DUN ET AL., CLAIMANTS, APPELLANTS,

v.

SAMUEL H. WALKER ET AL., APPELLEES, LIBELLANTS.

No. ~~479~~ 1 ~~65~~.

SAMUEL H. WALKER ET AL., APPELLANTS,

v.

ROBERT G. DUN ET AL., APPELLEES AND CLAIMANTS.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

IN ADMIRALTY.

BRIEF ON BEHALF OF WALKER AND OTHERS.

JOHN LATHROP AND SEBASTIAN BROWN,
of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1887.

THE SCHOONER MAGGIE J. SMITH.

NO. ~~312~~ 65.

ROBERT G. DUN ET AL., CLAIMANTS, *Appellants*,

v.

SAMUEL H. WALKER ET AL., APPELLEES, *Libellants*.

NO. ~~479~~ 1886.

SAMUEL H. WALKER, ET AL., *Appellants*,

v.

ROBERT G. DUN ET AL., *Appellees and Claimants*.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

BRIEF FOR WALKER AND OTHERS, THE APPELLEES IN THE FIRST CASE, AND THE APPELLANTS IN THE SECOND CASE.

STATEMENT OF THE CASES.

These cases grow out of a collision which took place early in the evening of February 26, 1883, between the two three-masted schooners, Enoch Robinson and Maggie J. Smith, off the coast of New Jersey.

The result of the collision was the total loss of the Enoch Robinson and her cargo, and the loss of the personal effects of her master and crew.

A libel *in rem* was filed by the owners of the Enoch Robinson against the Maggie J. Smith. A petition was also filed in the case by the officers and seamen of the Enoch Robinson, and another petition by the owners of the cargo on board.

The owners of the Maggie J. Smith, in addition to appearing and contesting the question of fault, took proceedings to limit their liability.

The first case relates to the general question of who was in fault; and the second to the question whether the owners of the Smith are liable beyond the value of their vessel, for interest and costs.

In the first case, at the term of this court when the appeal was entered, the appellees and the petitioners filed a motion to dismiss the appeal, which motion was overruled by the Court, no opinion being given. So far as this motion related to the petitioners, it is now renewed.

I. The Appeal should be dismissed as to the Petitioners.

It appears from the record, pp. 14, 15, that the petitioners' claims were separate and distinct, and each was less than five thousand dollars. It is respectfully submitted, therefore, that this court has no jurisdiction of the appeal of the owners of the Maggie J. Smith, so far as it relates to the claims of the petitioners.

The principle on which this motion is made has been fully settled by this court. In Rich *v.* Lambert, 12 How. 347, several distinct owners of a cargo filed libels against a vessel to recover damage done to the goods while on the vessel. They all recovered, the aggregate amount decreed to them being over ten thousand dollars. The claims of

only two exceeded two thousand dollars, the amount at that time sufficient to give this court jurisdiction. The claimants of the vessel appealed; those of the libellants whose separate claims were less than two thousand dollars moved to dismiss, and the motion was granted. One decree in the Circuit Court covered all the claims. "The appeal must be dismissed as to all the cases except the two in each of which the amount in the decree exceeds the two thousand dollars."

"In cases where the several claims against the ship are founded upon a common injury and loss . . . it is fit and proper that the proceedings should be joint."

"We do not perceive, therefore, any ground for a distinction as to the right of appeal from a decree as entered in these cases from that which exists where the proceedings have been distinct and separate throughout."

12 How. 352, 353.

This court has within the last few years fully considered the question; and it is only necessary to refer to the authorities.

Ex parte Baltimore & Ohio Railroad, 106 U. S. 5.
Farmers' Loan & Trust Co. *v.* Waterman, 106 U. S. 265.
Adams *v.* Crittenden, 106 U. S. 576.
Schwed *v.* Smith, 106 U. S. 188.
Hawley *v.* Fairbanks, 108 U. S. 543, 548.
Tupper *v.* Wise, 110 U. S. 398.
Silver v. Stanfield, 112 U. S. 27.

When the Maggie J. Smith was appraised, the claimants had the option of depositing the amount in court, or giving a stipulation. Had the money been deposited in court, or had the vessel been sold, the decree would simply have

ordered the clerk to pay the parties entitled *pro rata* out of the fund. The circumstance that the claimants procured two men to enter into a stipulation cannot alter the rights of the petitioners. The decree is in the usual form where the stipulation is for less than the claims. The payment of the whole or any part of the stipulation into court could not have interfered with an appeal, if the claimants were disposed to take one. The appeal would have prevented the clerk from paying out the money.

II. THE DECREE THAT THE OWNERS OF THE ENOCH ROBINSON WERE ENTITLED TO RECOVER WAS CORRECT.

The findings of fact are on pp. 12, 13 of the record, and the conclusions of law on p. 14.

The facts, as they appear in these findings, are briefly these: —

The Enoch Robinson was on a voyage from Baltimore, Md., to Providence, R. I., with a cargo of coal. The Maggie J. Smith was bound from New York to Newport News, Va. Both vessels were large three-masted schooners. The night was clear and starlight. The wind was about northwest, and blowing a whole-sail breeze. The Robinson's course was northeast, and that of the Smith was southwest. Each vessel had the wind abeam; the Robinson having it on the port side and the Smith on the starboard side. When the vessels were first seen from each other they were about two miles apart.

It is found as a fact that the vessels were approaching each other "end on or nearly so, and on courses involving risks of collision." Both vessels had their regulation lights set. The Judge finds that the Robinson ported almost immediately after the position of the Smith was discovered; and that the Smith starboarded, which starboarding, the Judge says in

his fifth finding, "was the direct cause of the collision." He also finds that "when those in charge of the Robinson perceived that the Smith was falling off, and that the vessels were approaching in dangerous proximity, they put the wheel of the Robinson hard-a-port, and let go the spanker sheet"; and that "a few seconds before the collision, the wheel of the Smith was first put to port, and then hard-a-port, but the head sheets were not let go; and before these changes to port materially affected the course of the Smith, the two vessels came together, the Smith striking the Robinson a square blow on the port side, near the mizzen rigging."

The Judge, on p. 14, makes two conclusions of law, in addition to the formal one as to the decree: —

"1. That the Smith was in fault in not porting her wheel when the Robinson was first seen approaching her, end on or nearly end on.

"2. That the Smith was in fault for putting her wheel to starboard, and this was the immediate cause of the collision."

Under the rules of navigation and the authorities, the Smith is clearly liable for the consequences of this collision.

Rule 16 (Art. 11), in force when this collision took place, is as follows: "If two sail-vessels are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each shall pass on the port side of the other."

U. S. Rev. Sts. (1st Ed.) 823.

In the case of the Nichols, 7 Wall. 656, a schooner, with the wind free and on her starboard side, came into collision with a bark close hauled, with the wind on her port side. Each vessel was seen from the other when two or three miles apart. They were approaching on lines which diverged not

more than half a point. The bark ported, and the schooner starboarded. The schooner was held in fault, notwithstanding the distance the vessels were apart, and the fact that, as their combined speed was twelve miles an hour, the collision did not take place until from ten to fifteen minutes after each was sighted.

In the Dexter, 23 Wall. 69, two schooners came into collision. When within half a mile, they were approaching from exactly opposite directions, end on or nearly so; one ported and the other starboarded; the latter was held in fault.

In the Annie Lindsley, 104 U. S. 185, there was a collision between a brig and a schooner. The Circuit Judge found that the wind was east of south; that the schooner was heading west by south; that the brig was close hauled on the starboard tack, her general course being east-northeast; that they were approaching end on, or nearly end on, so as to involve risk of collision; that the schooner ported until she made the red light of the brig; that the brig saw a light and starboarded. The brig was held in fault for starboarding.

It is to be noticed that the Judge did not find which light the brig saw; and the finding is no more full than in the case at bar.

This court affirmed the decree.

See also,

The North Star, 106 U. S. 17.
The Braga, 14 Law T. (N. S.) 258.
The Fingal, 13 Law T. (N. S.) 611.
The Radama, 2 Clifford, 551.
The S. B. Wheeler, 4 Clifford, 189.

An attempt was made by the appellants in their brief on our motion to affirm the decree, to construe a finding of fact

of the Judge of the Circuit Court into a conclusion of law, and then to contend that the conclusion was wrong. It is presumed that the same argument will be made again.

They also refer to a finding of fact, which they alleged that they asked for, in which they stated their theory of the case, and asked the Judge to find that "the two vessels were not meeting end on, or nearly end on, but were on parallel courses, the course of each being on the starboard of the other."

If this request were a part of the record, we should contend that as the Judge did not find the facts to be as requested, he must necessarily have found that the facts alleged by the appellants did not exist.

As we must argue this case on the record, we proceed to consider what the Judge found.

The fourth finding of fact is stated on p. 13 of the record.

The Judge states first, that when the vessels were first seen they were about two miles apart. He then states that those on the Smith aver that they then saw the Robinson "about two points on the starboard bow of the Smith." This is clearly taken from the answer filed by the owners of the Smith. On p. 10 the answer alleges that those in charge of the deck of the Smith "discovered a light bearing about two points on their starboard bow." The Judge then says that those on the Robinson "allege that they saw the Smith nearly dead ahead, and on a directly opposite course." This is evidently taken from the libel (record, p. 2), where it is said: "The lookout reported a light on the lee bow, and immediately after both the red and green lights were seen on a vessel approaching."

Then follows in the finding this sentence: "These statements, considered in connection with all the evidence, show the fact to be, and it is so found, that the vessels were ap-

proaching each other end on, or nearly so, and on courses involving risk of collision."

If the Judge had said: "On the pleadings and proofs, I find that the vessels were approaching end on, or nearly so," it could not be contended that any question would be open. And this is clearly the effect of his language. It can make no difference that, instead of referring to the pleadings, he states the substance of them. The effect is precisely the same.

It is respectfully submitted, therefore, that the finding of the Judge is a finding of fact, and not a conclusion of law; and that he did not rule, as contended by the appellants, on the assumption that the Robinson was, at the distance of two miles, on the starboard bow of the Smith.

If, however, the Court should take a different view of this finding, it remains to be considered whether the proposition contended for by the appellants is correct.

The proposition which they seek to maintain is, as stated in their former brief, that if two vessels, sailing as these were, would pass to starboard of each other, each ought to have starboarded, "although the vessels were about to pass dangerously near to each other."

In other words, they say that if two sailing vessels are approaching on parallel courses, each having the wind abeam, and the parallels are so near together as to involve risk of collision, both should starboard, if each has the other on its starboard side; that is, running green light to green light.

There is certainly no such rule laid down in the rules of navigation in force when this collision occurred. It is admitted by the appellants that there is danger of collision if nothing is done. The only rules which apply to sailing vessels are the 16th, 17th, 23d and 24th. If such vessels can be considered as crossing vessels within the seventeenth rule,

then, as the Robinson had the wind on her port side, it was her duty to take the initiative and keep out of the way of the Smith; but, under rule twenty-three, it was the duty of the Smith to keep her course.

The sixteenth rule requires both to port.

The theory that the sixteenth rule does not apply, had its origin in this country in the argument for the claimants in the case of the Annie Lindsley, 104 U. S. 185. It was there contended that even if both vessels were meeting end on, and the one on the starboard tack saw only a green light, she was justified in starboarding.

Reliance was placed by counsel on the twenty-fourth rule, which says that "In construing and obeying these rules, due regard must be had to all dangers of navigation rendering a departure from them necessary in order to avoid immediate danger."

This rule, however, has no application to the case where the vessels are seen two miles apart. The rule applies only when there is some peculiar danger of navigation, which renders a departure necessary to avoid immediate danger, such as a rock, another vessel, a narrow channel, or something of that nature.

See The Agra, 4 Moore, P. C. (N. S.) 435.
The Spring, L. R. 1 Adm. 99.
The Aura, Holt's Rule of the Road, 255.

In the last case, Dr. Lushington held that to justify under this rule "there must be abundantly clear and satisfactory proof that it was a matter of absolute necessity, and that nothing short of that will suffice."

In the case at bar, when the Smith omitted to port, she did so in disregard of the sixteenth rule, and not to avoid any immediate danger.

The St. of 7 and 8 Vict. c. 104, Sect. 296, provided that "whenever any ship, whether a steam or sailing ship, proceeding in one direction, meets another ship, whether a steam or a sailing ship, proceeding in another direction, so that if both ships were to continue their respective courses they would pass so near as to involve any risk of collision," the helm of each should be ported.

In the Cleopatra, Swabey, 135, two steamships came into collision. One alleged that it saw the green and white lights of the other, two points on the starboard bow, and starboarded, and the other ported. Dr. Lushington held that, if this story were true, the statute applied. "According to my view of the statute," he said, "the meaning is this: Whenever two vessels are seen from each other, even in parallel courses, provided they are close to each other, or in any course so that there is a reasonable probability of collision, it is their duty, unless there be some impediment, to obey the provisions of the statute."

It seems hardly necessary to say anything in regard to the citations made by counsel in the Annie Lindsley, from Jenkins's Rule of the Road.

Page 44 cites an order in council changing Articles 11 and 13 of the law of 1862.

Pp. 124, 125, 127, 129, 135, contain some remarks on the Rule of the Road by a Captain Curme, R. N. The pages cited refer merely to steamships. P. 208 also applies to steamships, and is by Mr. Thomas Gray.

It is clear that it may be advisable to have one rule for two steamships meeting, while another may be better for two sailing vessels.

The present rules in force all over the world do away with the rule of end on as to sailing vessels, but apply it to steamships, with certain modifications.

If the collision had occurred under the present rules, the Smith would be held in fault for changing her course, although she would not have been obliged to port.

It is to be noticed that, in a recent case in England. it has been pointed out that what is to be avoided is not merely a collision, but the "risk" of a collision, and that the rules are applicable, "not merely for the purpose of preventing a collision, but for the purpose of preventing even a risk of collision."

The Beryl, 9 P. D. 137, 138.

In the Sylph, 2 Spinks, 75, 82, Dr. Lushington said: "This chance of collision is not to be scanned by a point or two. We have held, over and over again, that if there be a reasonable chance of collision it is quite sufficient. It is so difficult to ascertain whether a vessel is coming right on, or bears two or three points on the starboard or larboard bow, that we have always held, if there be a reasonable chance of collision, the Act of Parliament applies."

This court has also declared that "Rules of navigation are obligatory on vessels approaching each other, from the time the necessity for precaution begins."

New York and Liverpool Steamship Co. *v.* Rumball, 21 How. 372, 384.

The Nichols, 7 Wall. 656, 663.

If two vessels are running, green light to green light, on parallel courses, they may be at such a distance apart that there can be no collision without some disturbing cause. It is equally true, that, running in this way, they may pass dangerously near to each other; one of them may be becalmed, as they are passing, and control be lost; the difference in their leeways may bring their lines of approach nearer to-

gether; a mistake, from sudden alarm, may be made on either vessel *in extremis*, which will bring about a collision. No prudent seaman would run the risk of such contingencies. Something must be done to prevent "the risk of collision." "The necessity for precaution exists." What is to be done? The appellants say each should starboard. But no rule of navigation says so. The appellees say each should port. So the rule of navigation declares.

Will the Court then say, that in all cases of vessels running green to green, even when, as in the case supposed, there is risk of collision if both keep on their courses, both should starboard.

It is respectfully submitted that the Court will not thus override the rule established by Congress, which, when this collision occurred, was the rule of the maritime world.

III. Appellants' Exceptions.

The decree in this case was filed on May 3, 1884. (Record, p. 14.)

Ten days afterwards, the appellants filed two exceptions. (Record, pp, 16, 17.)

1. It is submitted that these exceptions are not properly before the court.

By the St. of 1875, c. 77, § 1, the jurisdiction of this court is limited "to a determination of the questions of law arising upon the record, and to such rulings of the Circuit Court, excepted to at the time, as may be presented by a bill of exceptions prepared as in actions at law."

Certainly, exceptions filed ten days after the findings are made and a decree is entered, cannot be said to be taken at the time the rulings are made.

The Circuit Court had no jurisdiction to entertain propositions of law without first opening the decree.

United States *v.* Carey, 110 U. S. 51.

Although the Court may, under the appeal, consider all questions of law arising on the record, yet it must be remembered, that the finding of facts in this case was made before the questions of law presented by the exceptions were brought to the attention of the Judge. It is only, therefore, fair, both to the Judge and the parties, that every presumption should be made in favor of the decree; and that, if the findings bear two constructions, this court should adopt the one which will support the decree.

2. The first exception is that the Judge refused to find "the following proposition of law": "That even if the vessels were approaching end on, or nearly so, when at the distance of two miles apart, and the Maggie J. Smith, at that distance apart and under those circumstances, was starboarded, her fault, if any, in that respect, was not such as to render her responsible for the damages claimed in this suit."

If this request for a ruling had been made in season, the Judge would have been justified in refusing it.

The rule applies, when vessels are in such proximity "as to involve risk of collision."

The question when they are in such proximity is a question of fact and not of law. It depends on the force of the wind and what sails the vessels are under; in other words, upon their combined rate of speed.

The record now before the Court does not state what the rate of speed of either vessel was. For aught that the Court can know, their combined rate may have been very great.

It is impossible, therefore, for this Court to say, as matter of law, that at two miles apart risk of collision was not involved.

In the Nichols, 7 Wall. 656, the combined rate of speed was twelve miles an hour. One vessel ported and the other starboarded when they were two or three miles apart. The one which starboarded was held in fault.

See, also, the Dexter, 23 Wall. 69, 75.

The exception assumes, without any foundation, that the vessels were two miles apart when the Smith starboarded.

The fourth finding of fact states in substance that the vessels were first seen from each other when *about* two miles apart; that the Smith starboarded, but when is not stated; that the Robinson ported *almost immediately after* the position of the Smith was discovered.

As a matter of fact, the Court did not find that the vessels were two miles apart when the Smith starboarded. The point of time when she starboarded is not mentioned in the findings, and can only be gathered from the pleadings and other papers in the record.

The findings are construed in connection with the pleadings (the Adriatic, 107 U. S. 512), and parties will not be permitted to contradict by proof what they have admitted in their pleadings. McKinlay *v.* Morrish, 21 How. 343.

The libel alleged that the vessels were running red to red, three or four minutes before the Smith starboarded, and the claimants, by their answer and by their statement of facts found in the record, admit that the vessels had been in sight for some time before the Smith starboarded, and that, when

she did so, the vessels were less than half a mile apart. The point of time of starboarding and about the distance apart of the vessels — less than half a mile — were not in controversy either in the pleadings or in the proofs. The only question was whether they were meeting end on or were passing on parallel courses at a safe distance apart. Apart from the pleadings and admissions, the words all taken in connection with the facts as found, do not bear the construction asked for by the appellants.

The words of the findings commencing, "Those in charge of the Maggie J. Smith, in order, as they allege, to give the Robinson a wider berth, starboarded," cover a statement in the answer as follows: "The Maggie J. Smith continued to hold her course southwest . . . and when said vessels came within one half to one quarter of a mile of each other . . . said latter vessel (the Maggie J. Smith) . . . slightly starboarded."

The decree will be supported by every fair, legal intendment, and, if the finding will bear two constructions, that will be adopted most favorable to the validity of the decree. The fact that the Court, in the order of words, chanced first to speak of the Smith starboarding before speaking of the Robinson porting has no significance.

3. The second exception is as follows: "That if those in charge of the Enoch Robinson, when they perceived that the Maggie J. Smith had starboarded and was falling off to port, and that the vessels were approaching in dangerous proximity, while they saw the Maggie J. Smith falling off as aforesaid so as to cause the Enoch Robinson to fall in the same direction, then the Enoch Robinson was also in fault, and is responsible for part of the damages resulting from the collision which afterwards occurred."

This request for a ruling is unintelligible.

If the request was intended to apply to the findings, and can be so construed, it amounts to this: That where two vessels, A and B, are meeting end on or nearly end on, and A ports and B starboards, and A, when it is perceived that B has starboarded and is falling off, and the vessels are approaching in dangerous proximity, puts her helm hard-a-port, so as to fall off still more, then A is also in fault, and responsible for part of the damages.

If this presents a question of law and not one of fact, there are several reasons why it should not have been given.

Whether it would have been more prudent for the Robinson to have luffed instead of keeping off, in the dangerous position in which she was placed by the disregard of the positive statutory provision on the part of the Smith, depends upon facts and circumstances not disclosed in the exception or in the findings of fact; namely, the angle at which the vessels were approaching, the distance they were apart, and their combined speed.

It is always a question of nice calculation, under such circumstances, whether a collision can best be avoided by luffing or by keeping away, and it is a question which courts will not go into. The master has got to determine this at once, founded upon his judgment of the angle at which the vessels are approaching, the distance they are apart, and their combined speed. The Court never goes into this question. The rule is well settled that if one vessel is brought into immediate jeopardy by the fault of another, the fact that an order other than that which was given might have been more fortunate will not prevent recovery of full damages. In the words of Chief Justice Taney, in the Genesee Chief, 12 How. 461, "if an error was committed under such circumstances, it was not at fault."

See also

The Nichols, 7 Wall. 656.
The Carroll, 8 Wall. 302.
The Fairbanks, 9 Wall. 420.
The City of Paris, 9 Wall. 634.
The S. C. Tryon, 105 U. S. 267.

The case of the Bywell Castle, 4 P. D. 219, though a case of collision between two steamers, has an important bearing upon the case at bar in one aspect. The collision was between the Princess Alice and the Bywell Castle. They were running in opposite directions, red light to red light. The Princess Alice starboarded, which brought her towards the course of the Bywell Castle. Her red light was shut in, and her green light alone appeared. The danger was then imminent. The Bywell Castle put her helm hard-to-port, and ran into the Princess Alice. Sir Robert Phillimore held that both vessels were to blame, the Trinity masters being of the opinion that when the green light of the Princess Alice appeared upon the port bow of the Bywell Castle, the latter ought to have starboarded. In this conclusion of fact, the assessors of the Appellate Court agreed; but that court held that although porting was an error, it was one *in extremis*, caused by the fault of the other vessel, and was not a fault. This case is cited with approval in the Elizabeth Jones, 112 U. S. 514, 526.

IV. Appeal in the Second Case.

By the record, p. 19, it appears that the libellants and petitioners, after the decree was signed against the stipulators, requested the Court to sign a separate decree against the claimants of the Maggie J. Smith, directing them to pay interest on the amount of the stipulation from the date of the stipulation, and costs in the District and Circuit Courts, incurred by the libellants and petitioners by reason of the claimants' denial of, and resistance against, any liability for the collision.

The Court refused; and the libellants, the owners of the Robinson, appealed.

The Court clearly erred.

The Wanata, 93 U. S. 600.
The Manitoba, 122 U. S. 97. The Favorite, 12 Fed. Rep. 213.

This court has jurisdiction of the appeal.

Walsh *v.* Mayer, 111 U. S. 31.

Although matters which are the subject of discretion in the Court are not usually entertained, yet where, as here, the Court has the whole case before it, it has control over such matters as well as the merits.

The Scotland, 118 U. S. 519.

In the case of the Scotland, the Court granted costs only in part, on account of the circumstances of that case. In the case at bar, the libellants only ask their costs and interest, as in an ordinary case, no costs having been incurred in consequence of the limitation of liability.

JOHN LATHROP,
SEBASTIAN BROWN,
Counsel for the Appellees in the first case, and the Appellants in the second case.